1995

Utah Department of Transportation v. Joseph Val Ray Roberts and Verle H. Roberts : Memorandum Decision

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

UTAH DEPARTMENT OF TRANSPORTATION, Plaintiff and Appellee, vs. JOSEPH VAL RAY ROBERTS and VERLE H. ROBERTS, Defendants and Appellants.	:	ADDENDUM 950305 Case No. ~~950136~~-CA Priority #15

An Appeal from Second District Court
of Davis County
The Honorable Rodney S. Page, Judge

J. VAL ROBERTS
Attorney at Law
P. O. Box 666
Centerville, Utah 84014

Attorney for Appellants

STEPHEN C. WARD
Assistant Attorney General
State Attorney General
4120 State Office Building
Salt Lake City, Utah 84114

Attorney for Appellee

IN THE UTAH COURT OF APPEALS

----ooOoo----

Utah Department of Transportation, Plaintiff and Appellee, v. Joseph Val Ray Roberts and Verle H. Roberts, Defendants and Appellants.	)	MEMORANDUM DECISION (Not For Official Publication) Case No. 950136-CA F I L E D (October 12, 1995)

Second District, Davis County
The Honorable Rodney S. Page

Attorneys: J. Val Roberts, Centerville, for Appellants
Jan Graham and Stephen C. Ward, Salt Lake City, for Appellee

Before Judges Orme, Greenwood, and Wilkins (Law and Motion).

PER CURIAM:

Appellants J. Val Roberts and Verle H. Roberts appeal from a judgment awarding damages for condemnation of real property. This appeal is before the court on appellee's motion to dismiss the appeal or affirm the judgment and motion to strike appellant's docketing statement and on appellant's motion for partial summary reversal. Appellant's request for oral argument is denied on the basis of our determination that "[t]he facts and legal arguments are adequately represented in the [memoranda] and record and the decisional process would not be significantly aided by oral argument." Utah R. App. P. 29(a)(3).

Appellants contend that the trial court erred in limiting the issues at trial to the value of the property taken and severance damages, if any, based upon the parties' stipulation. Under the facts of this case, where the stipulation does not expressly reserve for trial the issue of the necessity of the taking, and the evidentiary hearing on the issue was vacated and an order of immediate occupancy issued based on the stipulation, the trial court did not err in limiting the scope of the issues for trial to the value of the property taken. See Cornish Town

v. Koller, 817 P.2d 305, 309 (Utah 1991); Redevelopment Agency v. Tanner, 740 P.2d 1296, 1299-30 (Utah 1987). The trial court's order of immediate occupancy, in reliance upon the stipulation, made the required findings as to public purpose and need for the property. Having made those findings, the trial court did not err in placing the burden of proof on appellants to show the value of the property taken. See Utah State Road Comm. v. Friberg, 687 P.2d 821, 832 (Utah 1984). Appellants' claim that appellee lacked authority to use eminent domain proceedings to obtain property for sidewalk construction is without merit. See Utah Code Ann. § 27-12-96(9) (1995). Finally, appellants have failed to demonstrate that the trial court's findings of fact in support of its judgment on the value of the property taken are clearly erroneous. See State v. Pena, 869 P.2d 932, 935-36 (Utah 1994).

Appellants seek summary reversal of the trial court's order requiring appellee "to install fill so the distance from the top of the retaining wall to the ground level is no greater than 2 feet 6 inches in the area immediately west of the retaining wall," to slope the area three feet to the west, and to install sod. The trial court specifically found no severance damages resulted from the manner in which the wall was constructed. Appellant seeks reversal of this ruling and a determination by this court that appellee must install a safety railing or pay for taking an additional three feet of appellants' property. Although there may be some question about whether the trial court had authority to fashion an equitable remedy in this condemnation case, appellants' request for a safety railing also assumes that the court had this authority. Appellants did not preserve the issue that the remedial measures constituted an additional taking in the trial court. Under the facts of this case, appellants have demonstrated no basis for reversal of the ruling. The remaining issues raised on appeal are without merit.

The judgment is affirmed.

Gregory K. Orme, Presiding Judge

Pamela T. Greenwood, Judge

TABLE OF CONTENTS

Authorities Cited

CASES Page

STATUTES Page

CONSTITUTION Page

AMENDMENT Page

LETTER Page

TRIAL AND HEARING RECORDS Page

TRIAL AND HEARING RECORDS Page

[424 US 295]

ALAMO LAND & CATTLE CO., INC., Petitioner,

v

STATE OF ARIZONA

424 US 295, 47 L Ed 2d 1, 96 S Ct 910

[No. 74–125]

Argued October 14 and 15, 1975. Decided February 24, 1976.

SUMMARY

In federal condemnation proceedings involving lands which, under the New Mexico-Arizona Enabling Act (36 Stat 557), were held in trust by Arizona for school purposes under federal grants, and which had been leased by Arizona to a private party under a 10-year grazing lease as authorized by the Act, the United States District Court for the District of Arizona held that the lessee was entitled to share in the compensation award to the extent of both its leasehold interest at the time of condemnation and its improvements on the lands. The United States Court of Appeals for the Ninth Circuit recognized that the lessee was entitled to compensation for the improvements, but held that under the Enabling Act, Arizona had no power to grant a compensable property right to the lessee (495 F2d 12).

On certiorari, the United States Supreme Court reversed and remanded. In an opinion by BLACKMUN, J., expressing the view of six members of the court, it was held that (1) nothing in the Enabling Act, apart, possibly, from the extent it might incorporate Arizona law by reference, prevented the usual application of Fifth Amendment protection of an outstanding leasehold interest, and thus Arizona could execute a grazing lease in such a manner that the lessee would be entitled to just compensation for the value of the unexpired leasehold interest upon federal condemnation, and (2) on remand, the Court of Appeals should determine various questions, including whether under state law and the lease provisions, the lessee could not possess a compensable leasehold interest upon federal condemnation.

WHITE, J., joined by BRENNAN, J., dissented, expressing the view that

Briefs of Counsel, p 839, infra.

under the Enabling Act, the lessee was entitled to compensation only to the extent of the improvements

STEVENS, J , did not participate

HEADNOTES

Classified to U S Supreme Court Digest, Lawyers Edition

Public Lands § 26 — federal grants to state — sale

1a, 1b The full value provision of the New Mexico-Arizona Enabling Act (36 Stat 557), which provides that no lands held in trust by Arizona under federal grants shall be sold for less than their appraised value, does not exclude an appropriate deferred payment arrangement

Eminent Domain § 108 — federal condemnation — Arizona trust lands — rights of lessee

2a, 2b, 2c Nothing in the New Mexico-Arizona Enabling Act (36 Stat 557), apart, possibly, from the extent it may incorporate Arizona law by reference, prevents the usual application of Fifth Amendment protection of an outstanding leasehold interest, and Arizona may execute a 10-year grazing lease of lands

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

27 AM JUR 2d, Eminent Domain §§ 250, 352–355, 63 AM JUR 2d, Public Lands §§ 23, 107

9 AM JUR PL & PR FORMS (Rev ed), Eminent Domain, Forms 27, 214, 11 AM JUR PL & PR FORMS (Rev ed), Federal Practice and Procedure, Forms 2001–2011

7 AM JUR LEGAL FORMS 2d, Eminent Domain §§ 97 1 et seq , 15 AM JUR LEGAL FORMS 2d, Public Lands §§ 212 16–212 18

4 AM JUR PROOF OF FACTS 649, Eminent Domain

11 AM JUR TRIALS 189, Condemnation of Urban Property

USCS, Constitution, 5th Amendment

US L ED DIGEST, Eminent Domain § 108, Public Lands § 26

ALR DIGESTS, Eminent Domain § 271, Public Lands § 5

L ED INDEX TO ANNOS, Eminent Domain, Public Lands

ALR QUICK INDEX, Eminent Domain, Public Lands

FEDERAL QUICK INDEX, Eminent Domain, Public Lands

ANNOTATION REFERENCES

Measure of damages payable on condemnation of real property by federal government 19 L Ed 2d 1361

Elements and measure of lessee's compensation for taking leasehold in eminent domain 94 L Ed 826 3 ALR2d 286

Federal courts federal or state law as applicable in determining what is property for which compensation must be paid upon its taking by the federal government 1 ALR Fed 479

—held in trust for school purposes by Arizona under federal grants—in such a manner that the lessee, upon federal condemnation of the lands, will be entitled to just compensation for the value of the unexpired leasehold interest

Public Lands § 26 — federal grants to state — disposition of state's interest

3 The New Mexico-Arizona Enabling Act (36 Stat 557) requires that when Arizona disposes of its interest in lands held in trust under federal grants, the trust is to receive, at the time of disposition, the then full value of the particular interest which is being dispensed

Eminent Domain § 108 — just compensation — leasehold interest

4 The holder of an unexpired leasehold interest in land is entitled, under the Fifth Amendment, to just compensation for the value of that interest when it is taken upon condemnation by the United States

Damages §§ 120, 122; Eminent Domain § 108; Public Lands § 26 — federal grants to Arizona — lease — condemnation

5 When a lease is made by Arizona of land held in trust under federal grants pursuant to the New Mexico-Arizona Enabling Act (36 Stat 557), the trust must receive from the lessee the then fair rental value of the possessory interest transferred by the lease, and upon a subsequent condemnation of the land by the United States, the trust must receive the then full value of the reversionary interest that is subject to the outstanding lease, plus the value of the rental rights under the lease, the trust is not entitled, in addition, to receive the compensable value, if any, of the leasehold interest, which if it exists and if the lease is valid, is the lessee's

Damages § 122 — condemnation of leasehold interest

6 Ordinarily, upon condemnation of a leasehold interest by the United States, the leasehold interest has a compensable value whenever the capitalized fair rental value for the remaining term of the lease, plus the value of any renewal right exceeds the capitalized value of the rental specified in the lease

Eminent Domain § 108, Public Lands § 26 — federal grants to Arizona — lease — condemnation

7 Under the New Mexico-Arizona Enabling Act (36 Stat 557), if a lease is made by Arizona of land held in trust under a federal grant for a rental of substantially less than the land's fair rental value, the lease is null and void, and the holder of the claimed leasehold interest is not entitled to compensation upon condemnation of the land by the United States

Public Lands § 26 — Arizona trust lands — grazing lease

8 Under the provision of the New Mexico-Arizona Enabling Act (36 Stat 557) that no "mortgage or other encumbrance" of trust lands held by Arizona under federal grants shall be valid a lease of trust lands for grazing purposes for a term of 10 years or less, as authorized by the Act, is not a prohibited "mortgage or encumbrance "

Appeal and Error § 1692 1 — remand — questions not considered below

9a, 9b Upon holding that a United States Court of Appeals erred in concluding that under the New Mexico-Arizona Enabling Act (36 Stat 557), a lessee of school trust lands held by Arizona under federal grants was not entitled to compensation for the unexpired leasehold interest upon federal condemnation of the lands, the United States Supreme Court will remand the case for the Court of Appeals' determination of the questions, not initially determined by the Court of Appeals, (1) whether, under state law and the lease provisions, the lessee could not possess a compensable leasehold interest upon the federal condemnation, (2) if the lessee did possess such an interest, how it is properly to be evaluated and calculated (with the subsidiary questions of the relevance of pos

sible lease renewals and of possible value additions by reason of the lessee's development of adjoining properties), and (3) if such interest proves to be substantial, whether it is permissible to find from such fact a violation of the Enabling Act's requirement that a lease, when offered, shall be appraised at its true value and be given at not less than such value

Damages § 122; Public Lands § 26 — Arizona trust lands — leasehold interest

10a, 10b Under the New Mexico-Arizona Enabling Act (36 Stat 557), rentals under a grazing lease of lands held in trust by Arizona under federal grants must be adjusted to reflect current fair rental value before any renewal of the lease, and thus upon federal condemnation of the lands, the calculation of the lessee's compensable leasehold interest cannot include the prospect of renewing the lease at less than fair rental value

SYLLABUS BY REPORTER OF DECISIONS

In 1962 Arizona, as lessor, and petitioner, as lessee, executed a 10-year grazing lease of certain tracts of land which had been granted to Arizona to be held in trust under the New Mexico-Arizona Enabling Act In 1966 the United States filed a condemnation complaint in connection with a flood control dam and reservoir which included the leased tracts In allocating the stipulated compensation payable by the United States for the tracts the District Court awarded Arizona a certain amount for its fee interest and petitioner one amount for the improvements and another amount for "its leasehold interest at the time of taking and its reasonable prospective leasehold interest" The Court of Appeals, while recognizing that petitioner was entitled to compensation for the improvements, and finding it unnecessary to determine petitioner's rights based upon the provisions of the lease or upon state law, held that under the Enabling Act Arizona, as trustee, had no power to grant a compensable leasehold interest and that petitioner therefore never acquired a property right for which it is entitled to compensation *Held*

1 Nothing in the Enabling Act, apart, possibly, from the extent it may incorporate Arizona law by reference, prevents the usual application of Fifth Amendment protection of the outstanding leasehold interest whereby the holder of such an interest is entitled to just compensation for the value of that interest when it is taken upon condemnation by the United States

2 To be determined on remand are (1) whether, under state law and the provisions of the lease, petitioner could not possess a compensable leasehold interest upon the federal condemnation, (2) if petitioner did possess such an interest, how it is properly to be evaluated and calculated (with the subsidiary questions of the relevance of possible lease renewals and of possible value additions by reason of petitioner's development of adjoining properties), and (3) if that interest proves to be substantial, whether it is permissible to find from that fact a violation of the Enabling Act's requirement that a lease, when offered, shall be appraised at its "true value" and be given at not less than that value

495 F2d 12 reversed and remanded

Blackmun, J , delivered the opinion of the Court, in which Burger, C J , and Stewart, Marshall, Powell, and Rehnquist, JJ , joined White, J , filed a dissenting opinion, in which Brennan, J , joined, post p 311, 47 L Ed 2d, p 13 Stevens, J , took no part in the consideration or decision of the case

APPEARANCES OF COUNSEL

J. Gordon Cook argued the cause for petitioner

Peter C. Gullato argued the cause for respondent

Briefs of Counsel, p 839, infra

OPINION OF THE COURT

Mr Justice **Blackmun** delivered the opinion of the Court

This case presents an issue of federal condemnation law—as it relates to an outstanding lease of trust lands—that, we are told, affects substantial acreage in our Southwestern and Western States

I

Under § 24[1] of the New Mexico-Arizona Enabling Act, 36 Stat 572 (1910), specified sections of every township in the then proposed State were granted to Arizona "for the support of common schools" By § 28[2]

[424 US 297]

of the same Act, 36 Stat 574, as amended by the Act of June 5, 1936, c 517, 49 Stat 1477, and by the Act of June 2, 1951, 65 Stat 51, the lands transferred "shall

[424 US 298]

be by the said State held in trust, to be disposed of in whole or in part only in manner as herein provided and for the several objects specified

1. "Sec 24 That in addition to sections sixteen and thirty six, heretofore reserved for the Territory of Arizona, sections two and thirty two in every township in said proposed State not otherwise appropriated at the date of the passage of this Act are hereby granted to the said State for the support of common schools "

2 "Sec 28 That it is hereby declared that all lands hereby granted, including those which, having been heretofore granted to the said Territory, are hereby expressly transferred and confirmed to the said State, shall be by the said State held in trust, to be disposed of in whole or in part only in manner as herein provided and for the several objects specified in the respective granting and confirmatory provisions, and that the natural products and money proceeds of any of said lands shall be subject to the same trusts as the lands producing the same

"Disposition of any of said lands, or of any money or thing of value directly or indirectly derived therefrom, for any object other than for which such particular lands, or the lands from which such money or thing of value shall have been derived, were granted or confirmed, or in any manner contrary to the provisions of this Act, shall be deemed a breach of trust

"No mortgage or other encumbrance of the said lands, or any part thereof, shall be valid in favor of any person or for any purpose or under any circumstances whatsoever Nothing herein contained shall prevent (1) the leasing of any of the lands referred to in this section, in such manner as the Legislature of the State of Arizona may prescribe, for grazing, agricultural, commercial, and homesite purposes, for a term of ten years or less, or (4) the Legislature of the State of Arizona from providing by proper laws for the protection of lessees of said lands, whereby such lessees shall be protected in their rights to their improvements (including water rights) in such manner that in case of lease or sale of said lands to other parties the former lessee shall be paid by the succeeding lessee or purchaser the value of such improvements and rights placed thereon by such lessee

'All lands leaseholds, timber and other products of land, before being offered, shall be appraised at their true value, and no sale or other disposal thereof shall be made for a consideration less than the value so ascertained

No lands shall be sold for less than their appraised value

"A separate fund shall be established for each of the several objects for which the said grants are hereby made or confirmed, and whenever any moneys shall be in any manner derived from any of said land the same shall be deposited by the state treasurer in the fund corresponding to the grant under which the particular land producing such moneys was by this Act conveyed or confirmed No moneys shall ever be taken from one fund for deposit in any other or for any object other than that for which the land producing the same was granted or confirmed

Every sale lease conveyance or contract of or concerning any of the lands hereby granted or confirmed, or the use thereof or the natural products thereof not made in substantial conformity with the provisions of this Act shall be null and void any provision of the constitution or laws of the said State to the contrary notwithstanding

and . . . the . . . proceeds of any of said lands shall be subject to the same trusts as the lands producing the same." Arizona, by its Constitution, Art 10, § 1,[3] accepted the lands so granted and its trusteeship over them.

Among the lands constituting the grant to Arizona were two parcels herein referred to as Tract 304 and Tract 305, respectively.[4] On February 8, 1962, Arizona, as lessor, and petitioner Alamo Land and Cattle Company, Inc. (Alamo), as lessee, executed a grazing lease of

[424 US 299]

these tracts for the 10-year period ending February 7, 1972. App 6-14. By Arizona statute, Ariz Rev Stat Ann 37-281D (1974), incorporated by general reference into the lease, App 7, Alamo may not use the lands for any purpose other than grazing.

On May 31, 1966, while the two tracts were subject to the grazing lease and were utilized as part of Alamo's larger operating cattle ranch, the United States filed a complaint in condemnation in the United States District Court for the District of Arizona in connection with the establishment of a flood control dam and reservoir at a site on the Bill Williams River. The tracts in their entirety were among the properties that were the subject of the complaint in condemnation. The District Court duly entered the customary order for delivery of possession.[5]

Thereafter, the United States and Arizona and, separately, the United States and Alamo, stipulated that "the full just compensation" payable by the United States "for the taking of said property, together with all improvements thereon and appurtenances thereunto belonging" was $48,220 for Tract 304 and $70,400 for Tract 305, and thus a total of $118,620 for the two. 1 Rec 156, 162.[6]

At a distribution hearing held to determine the proper allocation of the compensation amounts, the only parties claiming an interest in the awards for the two tracts were respondent Arizona, asserting title through the federal grants to it, and petitioner Alamo, asserting a compensable leasehold interest in the lands and a compensable

[424 US 300]

interest in the improvements thereon. The State conceded that Alamo was entitled to receive the value of the improvements, but contested Alamo's right, as lessee, to participate in the

3. "All lands expressly transferred and confirmed to the State by the provisions of the Enabling Act approved June 20, 1910, including all lands granted to the State and all lands heretofore granted to the Territory of Arizona, and all lands otherwise acquired by the State, shall be by the State accepted and held in trust to be disposed of in whole or in part, only in manner as in the said Enabling Act and in this Constitution provided, and for the several objects specified in the respective granting and confirmatory provisions The natural products and money proceeds of any of said lands shall be subject to the same trusts as the lands producing the same."

4. "Tract 304

"All of Section 2, Township 10 North, Range 13 West, Gila and Salt River Base and Meridian, Yuma County, Arizona."

"Tract 305

"All of Section 36, Township 11 North, Range 13 West, Gila and Salt River Base and Meridian, Yuma County, Arizona." App 1-2.

5. No question is raised as to the propriety or effectiveness of the condemnation procedure.

6. These figures were also the compensation estimated for the respective tracts in the declaration of taking and paid into court. 1 Rec 15.

portion of the award allocated to land value. The District Court, with an unreported opinion, App 1-5, awarded Arizona $57,970 for its fee interest, and awarded Alamo $3,600 for the improvements and $57,050 for "its leasehold interest at the time of taking, and its reasonable prospective leasehold interest." 1 Rec pp 227–228. On appeal, the United States Court of Appeals for the Ninth Circuit, while recognizing that Alamo was entitled to compensation for the improvements, held that under the Enabling Act Arizona "had no power to grant a compensable property right to Alamo," and that "Alamo therefore never acquired a property right for which it is entitled to compensation." United States v 2562.92 Acres of Land, 495 F2d 12, 14 (1974). The Court of Appeals thus reversed the judgment of the District Court insofar as it concerned the leasehold interests. It remanded the cause for the entry of a new judgment in accordance with its opinion. Id., at 15. Because the Ninth Circuit's decision appeared to implicate this Court's decision in Lassen v Arizona ex rel. Arizona Highway Dept. 385 US 458, 17 L Ed 2d 515, 87 S Ct 584 (1967), and because it was claimed to be in conflict with Nebraska v United States, 164 F2d 866 (CA8 1947), cert denied, 334 US 815, 92 L Ed 1745, 68 S Ct 1070 (1948), we granted Alamo's petition for certiorari. 420 US 971, 43 L Ed 2d 650, 95 S Ct 1390 (1975).

II

The Lassen case was an action instituted by the Arizona Highway Department to prohibit the application by the State Land Commissioner of rules governing the acquisition of rights-of-way and material sites in federally donated lands held by Arizona in trust pursuant to the provisions of the Enabling Act. What was involved,

[424 US 301]

therefore, was the acquisition of interests in trust lands by the State itself. The Supreme Court of Arizona held that it could be presumed conclusively that highways constructed across trust lands always enhanced the value of the remainder in amounts at least equal to the value of the areas taken and therefore refused to order the Highway Department to compensate the trust. State v Lassen, 99 Ariz 161, 407 P2d 747 (1965). This Court unanimously reversed. In so doing, it observed that the more recent federal grants to newly admitted States, including Arizona, "make clear that the United States has a continuing interest in the administration of both the lands and the funds which derive from them." 385 US, at 460, 17 L Ed 2d 515, 87 S Ct 584.

The Court read § 28 of the Enabling Act with particularity. It emphasized the Act's requirements that trust lands be sold or leased only to " 'the highest and best bidder' "; that no lands be sold for less than their appraised value; that disposal of trust lands be " 'only in manner as herein provided' "; that disposition in any other way " 'shall be deemed a breach of trust' "; and that every sale or lease " 'not made in substantial conformity with the provisions of this Act shall be null and void.' " 385 US at 461–462, 17 L Ed 2d 515, 87 S Ct 584. The Court then examined the purposes of the Act and concluded that the grant "was plainly expected to produce a fund, accumulated by sale and use of the trust lands, with which the State could support the public institutions designated by the Act." Id., at 463, 17 L Ed 2d 515, 87

S Ct 584. Sales and leases were intended. The "central problem" was "to devise constraints which would assure that the trust received in full fair compensation for trust lands." Ibid. The Court concluded, for reasons stated in the opinion, that the Act's procedural restrictions did not apply when the State itself sought trust lands for its highway program.

[424 US 302]

[1a] The Court then turned to the standard of compensation Arizona must employ to recompense the trust for the interests the State acquired. It concluded that the terms and purposes of the grant did not permit Arizona to diminish the actual monetary compensation payable to the trust by the amount of any enhancement in the value of remaining trust lands. The Court emphasized that the Enabling Act "unequivocally demands both that the trust receive the full value of any lands transferred from it and that any funds received be employed only for the purposes for which the land was given." Id., at 466, 17 L Ed 2d 515, 87 S Ct 584. It again stressed the requirements of the Act and noted that "these restrictions in combination indicate Congress' concern both that the grants provide the most substantial support possible to the beneficiaries and that only those beneficiaries profit from the trust." Id., at 467, 17 L Ed 2d 515, 87 S Ct 584. All this was confirmed by the background and legislative history of the Enabling Act. Accordingly, it held that even where the State itself is the acquisitor, the Act's designated beneficiaries were to derive the full benefit of the grant. Thus, "Arizona must actually compensate the trust in money for the full appraised value of any material sites or rights-of-way which it obtains on or over trust lands." Id., at 469, 17 L Ed 2d 515, 87 S Ct 584.[7] (footnotes omitted) This standard, it was said, "most consistently reflects the essential purposes of the grant." Id., at 470, 17 L Ed 2d 515, 87 S Ct 584.

Much of what was said in Lassen had also been said, several decades earlier, in Ervien v United States, 251 US 41, 64 L Ed 128, 40 S Ct 75 (1919), when the provisions of the same Enabling Act were under consideration in a federal case from New Mexico. The Court's concern for the integrity

[424 US 303]

of the conditions imposed by the Act, therefore, has long been evident.

[2a, 3] But to say, as the Court did in Ervien and in Lassen, that the trust is to receive the full value of any lands transferred from it is not to say that the Act requires, in every Arizona case where a leasehold is outstanding at the time of the federal condemnation, that the trust is to receive the entire then value of the land and the possessor of the leasehold interest is to receive nothing whatsoever. What the Act requires—and we think that this is clear from Ervien and Lassen—is that the trust is to receive, at the time of its disposition of any interest in the land, the then full value of the particular interest which is being dispensed.

[4, 5] It has long been established that the holder of an unexpired leasehold interest in land is entitled,

7. **[1b]** The full-value provision does not exclude an appropriate deferred-payment arrangement. Lassen v Arizona ex rel. Arizona Highway Dept. 385 US 458, 469, n 21, 17 L Ed 2d 515, 87 S Ct 584 (1967).

under the Fifth Amendment, [8] to just compensation for the value of that interest when it is taken upon condemnation by the United States. United States v Petty Motor Co. 327 US 372, 90 L Ed 729, 66 S Ct 596 (1946); A. W. Duckett & Co. v United States, 266 US 149, 69 L Ed 216, 45 S Ct 38 (1924). See United States v General Motors Corp. 323 US 373, 89 L Ed 311, 65 S Ct 357, 156 ALR 390 (1945); Almota Farmers Elevator & Warehouse Co. v United States, 409 US 470, 35 L Ed 2d 1, 93 S Ct 791 (1973); 2 P. Nichols, Eminent Domain § 5.23 (Rev 3d ed 1975); 4 id. § 12.42 [1]. It would therefore seem to follow that when a lease of trust land is made, the trust must receive from the lessee the then fair rental value of the possessory interest transferred by the lease, and that upon a subsequent condemnation by the United States, the trust must receive the then full value of the reversionary interest that is subject to the outstanding lease, plus, of course, the value of the rental rights under the lease. The trust should not be entitled,

[424 US 304]

in addition to all this, to receive the compensable value, if any, of the leasehold interest. That, if it exists and if the lease is valid, is the lessee's. See State ex rel. La Prade v Carrow, 57 Ariz 429, 433–434, 114 P2d 891, 893 (1941).

[6] Ordinarily, a leasehold interest has a compensable value whenever the capitalized then fair rental value for the remaining term of the lease, plus the value of any renewal right, exceeds the capitalized value of the rental the lease specifies. The Court has expressed it this way:

> "The measure of damages is the value of the use and occupancy of the leasehold for the remainder of the tenant's term, plus the value of the right to renew . . ., less the agreed rent which the tenant would pay for such use and occupancy." United States v Petty Motor Co. 327 US, at 381, 90 L Ed 729, 66 S Ct 596.

See Almota Farmers Elevator & Warehouse Co. v United States, supra. A number of factors, of course, could operate to eliminate the existence of compensable value in the leasehold interest. Presumably, this would be so if the Enabling Act provided, as the New Mexico-Arizona Act does not, that any lease of trust land was revocable at will by the State, or if it provided that, upon sale or condemnation of the land, no compensation was payable to the lessee. The State, of course, may require that a provision of this kind be included in the lease. See United States v Petty Motor Co. 327 US, at 375–376 and, n 4, 90 L Ed 729, 66 S Ct 596; see also 4 Nichols, supra, § 12.42 [1], pp 12-488 and 12-489.

[7] A difference between the rental specified in the lease and the fair rental value plus the renewal right could arise either because the lease rentals were set initially at less than fair rental value, or because during the term of the lease the value of the land, and consequently its fair rental value, increased. The New Mexico-Arizona Enabling

[424 US 305]

Act has a protective provision against the initial setting of lease rentals at less than fair rental value. This is specifically prohibited by § 28. The prohibition is given bite by the further very drastic provision that a lease

8. "[N]or shall private property be taken for public use, without just compensation."

not made in substantial conformity with the Act "shall be null and void." Thus, if the lease of trust lands calls for a rental of substantially less than the land's then fair rental value, it is null and void and the holder of the claimed leasehold interest could not be entitled to compensation upon condemnation.

[2b] On the other hand, the fair rental value of the land may increase during the term of the lease.[9] If this takes place, the increase in fair rental value operates to create a compensable value in the leasehold interest. It is at this point, we feel, that the Court of Appeals erred when it held that the Act by its terms, and apart from the extent to which it incorporated Arizona law by reference, barred Arizona from leasing trust land in any manner that might result in the lessee's becoming constitutionally entitled to just compensation for the value of its unexpired leasehold interest at the time of the federal condemnation. Instead, the Act is completely silent in this respect.

III

[8] Arizona, however, suggests that this usually acceptable analysis may not be applied under the New Mexico-Arizona Enabling Act. It argues, as the Court of Appeals held, 495 F2d, at 14, that under that Act the State, as trustee, has no power to grant a compensable property

[424 US 306]

interest to Alamo, as lessee. It bases this thesis on the Enabling Act's provision in § 28 that no "mortgage or other encumbrance" of trust land shall be valid, and it claims that a lease is an encumbrance, citing, among other cases, Hecketsweiler v Parrett, 185 Or 46, 52, 200 P2d 971, 974 (1948) (agreement to sell real estate free and clear of encumbrances), and Hartman v Drake, 166 Neb 87, 91, 87 NW2d 895, 898 (1958) (partition). One seemingly apparent and complete answer to this argument is that § 28 goes on to authorize specifically a lease of trust land for grazing purposes for a term of 10 years or less, and further provides that a leasehold, before being offered, shall be appraised at "true value." See n 2, supra. These provisions thus plainly contemplate the possibility of a lease of trust land and, in so doing, intimate that such a lease is not a prohibited "mortgage or other encumbrance."[10] Furthermore, Arizona statutes in other contexts specifically protect the lessee's interest. Ariz Rev Stat Ann §§ 41-511.06, 37-291 (1974). See Ehle v Tenney Trading Co. 56 Ariz 241, 107 P2d 210 (1940). To this the State responds that, while a lease is possible, it falls short of being a compensable interest when the property is sold because the Act prohibits the sale unless the trust receives the full ap-

9. The Arizona statutes governing grazing leases of trust lands recognize this possibility and provide for adjustment of rent at specified times to account for fluctuations in fair rental value. Ariz Rev Stat Ann §§ 37-283, 37-285 (1974). Indeed, under § 28 of the Enabling Act, at the termination of a lease, a re-evaluation would appear to be required before release or renewal.

10. The Supreme Court of New Mexico long ago ruled that a grazing lease of state lands is not a "mortgage or . . . encumbrance," within the meaning of the identical prohibition, applicable to New Mexico, in § 10 of the New Mexico-Arizona Enabling Act, 36 Stat 563. American Mortgage Co. v White, 34 NM 602, 605–606, 287 P 702, 703 (1930). See United States v 40,021.64 Acres of Land, 387 F Supp 839, 848–849 (NM 1975); State ex rel. State Highway Comm'n v Chavez, 80 NM 394, 456 P2d 868 (1969).

praised value of the land. The argument assumes that such compensation is to be measured by the entire land value despite the presence of the outstanding lease. That approach overlooks the actuality of a two-step disposition

[424 US 307]

of interests in the land, the first at the time of the granting of the lease, and the second at the time of the condemnation. Full appraised value is to be determined and measured at the times of disposition of the respective interests, and if the State receives those values at those respective times, the demands of the Enabling Act are met. The State's argument would serve to convert and downgrade a 10-year grazing lease, fully recognized and permitted by the Act, into a lease terminable at will or into one automatically terminated whenever the State sells the property or it is condemned. The lessee is entitled to better treatment than this if neither the Enabling Act nor the lease contains any such provision. We have noted above that the Act or the lease, or both, could provide for that result. The Act, however, does not specifically so provide. Whether either the Act or the lease does so through incorporation of state law is an issue not addressed by the Court of Appeals, and it is to be considered on remand. We merely note that the fact that it is within Arizona's power to insert a condemnation clause in a lease it makes of trust land does not mean that the State may claim the same result when its lease contains no such clause.

IV

Alamo suggests that the Court of Appeals' decision is at odds with the above-cited case of Nebraska v United States, 164 F2d 866, cert denied, 334 US 815, 92 L Ed 1745, 68 S Ct 1070. There, in the face of a totality claim like that made by Arizona here, the Eighth Circuit ruled that trust lands in Nebraska were to be treated as any other property and that condemnation proceeds were subject to allocation between the State as trustee and the holder of an outstanding agricultural lease. The Nebraska Enabling Act of April 19, 1864, c 59, 13 Stat 47, was an earlier edition of this type of statute, and was adopted

[424 US 308]

more than four decades before the New Mexico-Arizona Act. It did not contain the detailed restrictive provisions that appear in the 1910 Act and that were developed and utilized as passing years and experience demonstrated a need for them. Because of this, one may say, as Arizona does, that the Nebraska case is distinguishable from the present one. But the decision is not devoid of precedential value, for it is consistent with our analysis of the New Mexico-Arizona Act in its recognition of the possibility of a compensable leasehold interest in trust land upon federal condemnation, and it demonstrates that the existence of that interest is not incompatible with the trust land concept. See also United States v 78.61 Acres of Land, 265 F Supp 564 (Neb 1967), a post-Lassen case; United States v 40,021.64 Acres of Land, 387 F Supp 839, 848–849 (NM 1975).

V

[9a] Finally, the Court of Appeals observed, but only in passing, 495 F2d, at 14, that the lease recited that it was made subject to the laws of Arizona; that if the State "relinquished" the property to the United States, the lease "shall be null and

void as it may pertain to the land so relinquished"; and that no provision of the lease "shall create any vested right in the lessee." The court also observed, ibid., that Ariz Rev Stat Ann §§ 37-242 and 37-293[11] restrict a lessee's participation in the

[424 US 309]

proceeds of a sale of public land to the value of improvements. Having made these observations, however, the court thereupon concluded that it did not find it necessary

[424 US 310]

"to determine the

11. § 37-242:

"A. When state lands on which there are improvements for which the owner thereof is entitled to be compensated are offered for sale, and the purchaser is not the owner of the improvements, the purchaser shall pay the person conducting the sale ten percent of the appraised value of the improvements and the balance within thirty days thereafter. If the state land department determines that the amount at which the improvements are appraised is so great that competitive bidding for the land will be thereby hindered, the department may sell the improvements on installments payable ten per cent upon announcement of the successful bidder, fifteen per cent thirty days thereafter, and fifteen per cent annually thereafter for five years, together with six per cent interest on the balance remaining unpaid, which amount, until paid, shall be a lien upon the land. The purchaser shall at all times, keep the insurable improvements insured for the benefit of the state. Payments shall be made at the time and in the manner prescribed for payments on the land, and any default in the payments for improvements shall be deemed a default in the payments for the land.

"B. When improvements are sold on installments, the first twenty-five per cent, after deducting all rents, penalties and costs owing to the state on account of the land, shall be paid to the owner of the improvements, and the balance shall become a legal charge against the state.

"C. Upon surrendering possession of any such land, the owner of the improvements thereof shall file with the commissioner of finance his claim for the balance on the improvements remaining unpaid, and if the claim bears the approval of the department as to correctness, and a certificate that possession of the lands and improvements has been surrendered by all persons having lawful claims for improvements on the land, it shall be paid by the state treasurer on the warrant of the commissioner of finance from any fund in which there is money subject to investment. As payments for the improvements are made by the purchaser, they shall be deposited with the state treasurer and both principal and interest shall be returned by him to the fund from which they were taken.

"D. Failure to pay the balance of the purchase price or the fifteen per cent within thirty days after the announcement of the successful bidder shall constitute a forfeiture of all rights to the land and all payments made."

. . . . . .

§ 37-293:

"A. A lessee of state lands shall be reimbursed by a succeeding lessee for improvements placed on the lands which are not removable. If the retiring lessee and the new lessee do not agree upon the value of the improvements, either party may file with the state land department an application for appraisal of the improvements. Thereafter an appraisal of the improvements shall be made in the same manner and subject to the same conditions as appraisals of improvements are made when state lands are sold.

"B. Upon making the appraisal, the department shall give notice of the amount thereof by registered mail to each person interested in the appraisal. The notice shall require that the new lessee pay to the department for the prior lessee the entire amount of the appraisal within thirty days from the date of the notice, or the department, when the value is greater than the rental for the period of the lease, may require that payment of ten per cent of the appraised value be made within thirty days, fifteen per cent within sixty days, twenty-five per cent at the end of the first year of the new lease, and twenty-five per cent at the end of each year thereafter until the entire balance is paid.

"C. If the improvements are not paid for as required in the notice, the succeeding lessee shall not be permitted to sell, assign, or transfer his lease, nor sell, assign or remove any improvements whatever from the land until the entire amount of the appraised value of the improvements has been paid. Upon default he shall be subject to the same penalties and liabilities as provided by § 37-288 for failure to pay rents, including a cancellation of the lease."

rights of Alamo based upon these lease provisions or the state law." 495 F2d, at 14.

The significance of the provisions referred to and of the cited statutes will now be for determination upon remand. We note only that the land in question was condemned and thus does not appear to have been technically "relinquished" by Arizona to the United States; that we are not at all sure that there is language of restriction in §§ 37-242 and 37-293; and that Ariz Rev Stat Ann §§ 37-288 and 37-290 respectively permit forfeiture for violation of the conditions of a lease or for nonpayment of rent, and cancellation of a lease if the leased land is reclassified to a higher use, and thus could explain the lease's provision against vesting in the technical sense that it is not subject to any contingency whatsoever.

[424 US 311]

[2c, 9b, 10a] To repeat: we hold that nothing in the Enabling Act apart, possibly, from the extent it may incorporate Arizona law by reference, prevents the usual application of Fifth Amendment protection of the outstanding leasehold interest. We leave for determination on remand the following: (1) whether, under state law and the lease provisions, Alamo could not possess a compensable leasehold interest upon the federal condemnation; (2) if Alamo did possess such an interest, how it is properly to be evaluated and calculated (with the subsidiary questions of the relevance of possible lease renewals[12] and of possible value additions by reason of Alamo's development of adjoining properties, cf. United States v Fuller, 409 US 488, 35 L Ed 2d 16, 93 S Ct 801 (1973)); and, (3) if that interest *proves to be substantial*, whether it is permissible to find from that fact a violation of the Enabling Act's requirement that a lease, when offered, "shall be appraised at [its] true value" and be given at not less than that value.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Mr. Justice **Stevens** took no part in the consideration or decision of this case.

SEPARATE OPINION

Mr. Justice **White** with whom Mr. Justice **Brennan** joins, dissenting.

The question in this case is whether, under § 28 of the

[424 US 312]

New Mexico-Arizona Enabling Act (Act), 36 Stat 574, the State of Arizona had the power to grant to petitioner a compensable leasehold interest in the property in issue. The question is solely one of statutory construction. As I agree with the Court of Appeals for the Ninth Circuit that Congress intended that lessees of land covered by the Act should acquire a compensable interest in leased land only to the extent

12. **[10b]** We note in regard to the possible value of renewal rights that leases of the kind in issue here are limited by statute to 10 years in duration, and that the Act requires that rentals be adjusted to reflect current fair rental value before any renewal. See n 9, supra. Therefore, although we do not foreclose the relevance of possible renewals, the calculation of the lessee's interest cannot include the prospect of renewing the lease at less than fair rental value.

of "improvements . . . placed thereon by such lessee," United States v 2562.92 Acres of Land, 495

terminable automatically upon sale or condemnation, is clearly an "encumbrance." 7 G. Thompson, Real Property § 3183, p 277 (1962); 2 Bouvier's Law Dictionary 1530 (8th ed 1914). A lease not so terminable is, therefore expressly prohibited by the Act. The majority opinion, however, finds implicit in the Act an exception to the express ban on encumbrances in the case of leases for terms of 10 years or less. It points to the fact that 10-year leases of school trust lands are expressly permitted by the Act and states that to treat a lease as an "encumbrance" under the circumstances would be to "downgrade a 10-year grazing lease, fully recognized and permitted by the Act, into a lease terminable at will or into one automatically terminated whenever the State sells the property or it is condemned." Ante, at 307, 47 L Ed 2d 11. Treating the lease as an encumbrance would certainly have the effect which the majority says it would. The majority does not disclose, however, why such an effect is contrary to the intent of the Act. Apparently, it simply finds illogical

[424 US 313]

the notion that a lease could be terminable on sale or condemnation and still be a "10-year" lease, notwithstanding the fact that treating 10-year leases as being so terminable is the only way to square them with the Act's unqualified ban on encumbrances.

It is Congress' policy, however

leases terminable at will or by sale or condemnation. In 1888 Congress provided, with respect to school trust lands granted to Wyoming, that the lands could be leased for 5-year periods but that such leases could be annulled at will by the Secretary of the Interior. 25 Stat 393. Of far more significance to this case was Congress' treatment of the lands granted to Oklahoma—the State to enter the Union most recently prior to the entry of Arizona and New Mexico—in the Oklahoma Enabling Act. C 3335, 34 Stat 267. In that Act, Congress expressly provided Oklahoma with the authority to lease school trust lands for 10-year periods while also clearly providing that upon sale of the lands during the period of the lease, the lessee would receive only the value of its improvements. That Act states with respect to sales of lands subject to a lease that "preference right to purchase at the highest bid [is] given to *the lessee at the time of such sale,*" ibid. (emphasis added); and then provides:

"[I]n case the leaseholder does not become the purchaser, the purchaser at said sale shall, under such rules and regulations as the legislature may prescribe, pay to or for the leaseholder the appraised value of . . . improvements, *and to the State the amount bid for said lands, exclu-*

sive of the appraised value
[424 US 314]
of im-

Moreover, in the single piece of legislative history shedding any light on the relevant portion of the Act, the Senate sponsor of the Act—Senator Beveridge—spoke approvingly of the restrictions placed on Oklahoma in dealing with school trust lands granted to it in the Oklahoma Enabling Act and indicated his belief that the restrictions on Arizona and New Mexico were more stringent. He stated:

"We took the position [in drafting the Act] that the United States owned this land, and in creating these States we were giving the lands to the States for specific purposes, and that restrictions should be thrown about it which would assure its being used for those purposes." 45 Cong Rec 8227 (1910).

. . . . . .

"We have thrown conditions around land grants in several States heretofore, notably in the case of Oklahoma, but not so thorough and complete as this."

The Oklahoma Enabling Act prevents the creation of a compensable interest in a lessee of school trust lands except to the extent of improvements placed thereon by him. A literal application of the New Mexico-Arizona Enabling Act at issue here reaches the same result.

Act had purposes similar to those of

The latter Act, passed only four years after the Oklahoma Enabling discernible from the Act and its legislative history. Congress anticipated that the value of the school trust lands would increase over time and it intended that the *schools,* not leaseholders, benefit from this increase. Pursuing this end, the Act set a minimum sales price for school trust lands of $3 per acre, 36 Stat 574, the House committee report explaining:

"The bill fixes a minimum price at which the lands granted for educational purposes subject to sale may be sold. . . .

"It is recognized by the committee as well as by other earnest advocates of a minimum price, that practically none of these lands are worth now anything like the minimum price fixed. . . . It is believed, however, that the advance of science, the extension of public and private irrigation projects, and the tendency toward the higher development of smaller holdings will, in the case of Arizona and New Mexico, as in the case of other States, *result in a sure, although possibly slow, increase of land values.*

"The educational lands which are subject to sale would probably not bring on the market now much more than 25 cents an acre, but if the history of other states in

which minimum prices, which at the time were considered prohibitive, were fixed shall be repeated in Arizona and New Mexico, it is of the utmost importance that some restriction be placed upon the sale of these lands.

"The experience of other States and the importance of fixing a minimum selling price for educational lands is indicated in the following extract

[424 US 316]

from a letter from former Secretary of the Interior Garfield addressed to the chairman of the committee in the last Congress:

" 'The history of the public-land States in the matter of the disposal of granted school lands has convinced me that those States which have a minimum price fixed on their lands granted for educational purposes get a much larger return from their lands. I am informed that most States with no minimum have not disposed of their lands to the best advantage, thus seriously failing to derive the full benefit to which the schools are entitled. The States of North and South Dakota, Montana, Wyoming, Idaho, and Washington have a $10 minimum fixed on their lands, and I am informed that none of these States, unless it is Wyoming, feels that this high minimum is harmful.

" 'On the contrary, I find that officials of these States are zealous and proud of the splendid school funds which they are creating from the sale of school lands. North Dakota, which a few years ago seemed to contain immense areas of poor land, is, I am informed, obtaining in many cases $15 or $20 per acre for its school sections. Colorado seems to have an exceedingly low minimum, $2 50; and nevertheless it has administered its land grants unusually well, securing from them very large returns, both from sales and from leases. For these reasons, I urge that a minimum price be fixed for these proposed new States. They will be able to lease most of their land, if it is not worth to-day the minimum price, and will thereby obtain an income.' " HR Rep No. 152 61st Cong, 2d Sess, at 2-3 (1910).

If leases were permitted to encumber school trust lands

[424 US 317]

at a time when they were worth less than the minimum sales price, then when the land rose in value—as Congress anticipated it would—and was sold for the minimum price or more, the State would have to give part of such sales price to the lessee. Such a result is utterly irreconcilable with the reasons for setting minimum sales prices. Plainly, Congress intended the school trust to receive the *full* sales price and to prevent the States from disposing of the lands in any fashion which would result in its receiving any less. Lessees were to receive none of the proceeds of sale of the land itself even if the land had appreciated in value subsequent to the creation of the lease.

To make its purpose even clearer, Congress, in dealing with the very question of whether the lessee should share in the proceeds when lands subject to the lease are sold, provided:

"Nothing herein contained shall prevent . . . (4) the Legislature of the State of Arizona from providing by proper laws for the protection of lessees of said lands, whereby such lessees shall be protected in their rights to their improvements (including water rights) in such manner that in case of lease or sale of said lands to other parties the former lessee shall be paid by the succeeding lessee or purchaser the value of such improvements and rights placed thereon by such lessee." 65 Stat 52.

The Act provides for no other kind of compensation to the lessee of lands sold. Under the majority opinion a lessee could, if the value of the lands increased after the lease was entered into, and if the lease had not expired at the time of any sale or condemnation, receive

[424 US 318]

a portion of the sale or condemnation price over and above the value of any improvements. In Lassen v Arizona ex rel. Arizona Highway Dept. 385 US 458, 466, 17 L Ed 2d 515, 87 S Ct 584 (1967), we said that Act "unequivocally demands . . . that the trust receive the full value of lands transferred from it." The majority now construes the Act to authorize a result contrary to the Act's "unequivocal demand" and, accordingly, I dissent.

a dispute, however, over whether Malnar had notice of the amendment at the time of SAM Oil's ratification. In its findings of fact, after discussing the transmission of the ratification documents to be signed by SAM Oil and Robertson, the Board states, "SAM Oil maintains that the April 27, 1983 amendment to the Unit Operating Agreement was not included with these materials.[7] BHP maintains that it was standard procedure to include all amendments." [8] Over the dissent of one member, the Board's conclusions of law state, "SAM Oil is subject to the 300% nonconsent penalty provided in the Unit Operating Agreement, as amended." We cannot find a logical connection between the Board's findings of fact and its conclusion of law. The Board's findings of fact do not expressly state whether SAM Oil received notice of the amendment prior to executing the ratification agreement; yet implicit in its conclusion of law is the premise that Malnar *did* have notice of the amendment.

We are unable to review the amount of the penalty imposed by the Board without a further finding of fact regarding whether SAM Oil, through Malnar, had notice of the amendment. Because this is a question depending in part on credibility, we remand for clarification. Depending on its finding regarding notice, the Board should enter an order holding that SAM Oil is subject to its proportionate share of the costs and the risk penalty (at either the 150 or the 300 percent level) described in section 9 of the unit operating agreement. The order should further provide that SAM Oil's working interest share of production from the well began to accrue on the first day of the month following the filing of the appropriate papers with the Bureau of Land Management pursuant to section 27 of the unit agreement. Finally, based on the revised date of accrual, the Board will need to reconsider whether the well has yet paid out the appropriate costs and penalty and therefore whether SAM Oil is owed any proceeds from production to date.

HALL, C.J., HOWE, Associate C.J., and STEWART and ZIMMERMAN, JJ., concur.

CORNISH TOWN, Plaintiff and Appellee,

v.

Evan O. KOLLER and Marlene B. Koller, husband and wife, Defendants and Appellants.

No. 880121.

Supreme Court of Utah.

Aug. 1, 1991.

Town brought condemnation action to create protection zones around springs on landowners' property, which springs were source of water for town's culinary system. The First District Court, Cache County, VeNoy J. Christoffersen, J., rendered judgment on special jury verdict for landowners and they appealed. The Supreme Court, Howe, Associate C.J., held that: (1) court was not obligated to allow landowners to relitigate issue of necessity of proposed taking; (2) landowners were not entitled to jury determination of public necessity of

onshore, and the depth to which it is to be drilled. The well at issue in this case was a relatively deep, exploratory well. The 300 percent risk compensation was therefore reasonable under the circumstances, and at the hearing, there was expert testimony to this effect.

7. Although there is evidence that Malnar was subsequently made aware of the amount of the amended penalty, BHP presented no evidence to the Board that he knew of the amendment at the time of the ratification. The cover letter dated January 4, 1984, does not refer to the 1983 amendment.

8. The weight of this allegation is misleading because it was *not* BHP who corresponded with Malnar concerning SAM Oil's joinder of the unit; it was the unit operator, Rio Bravo. While perhaps enlightening on the subject of industry practice, BHP's standard procedure does not have any direct relevance to the question in this case.

proposed taking; (3) landowners were not entitled to valuation of land as of date of first ordinance enacted to protect town's water supply; (4) court erred in refusing to admit evidence of existence of mineral deposits and their enhancement of value of land; and (5) town did not abandon condemnation action for purposes of award of attorney fees when it amended complaint to seek only perpetual easement.

Remanded.

1. **Eminent Domain ⇐195**

Where trial court permitted both landowner and town to fully present and litigate issue of necessity of proposed taking of landowner's property at hearing on motion for order of immediate occupancy and court entered written findings of fact sustaining town's right to condemn, court was not obligated to allow parties to again litigate that issue at trial, even though order of immediate occupancy was interlocutory in nature.

2. **Jury ⇐19(11)**

Landowner whose property was subject of condemnation action was not entitled to jury determination of public necessity of proposed taking. U.C.A.1953, 78–34–10.

3. **Jury ⇐19(11)**

Under federal law, there is no constitutional right to trial by jury in condemnation cases.

4. **Eminent Domain ⇐124**

Landowners whose property was subject of eminent domain action by town for purpose of creating protection zones around springs on property to reduce high nitrate level in spring water were not entitled to have land valued as of effective date of first town ordinance enacted to protect town's culinary water supply, inasmuch neither ordinance nor its successors amounted to regulatory taking. U.C.A.1953, 78–34–11.

5. **Eminent Domain ⇐2(1)**

For purposes of recovering compensation for "regulatory taking" of one's property, even "temporary" regulatory taking requires denial of all uses of property.

6. **Eminent Domain ⇐2(1)**

Mere diminution in property value is insufficient to meet burden of demonstrating taking by regulation.

7. **Eminent Domain ⇐202(1)**

Trial court in condemnation action erred in refusing to admit evidence of existence of mineral deposits and their enhancement of value of land sought to be condemned on basis that there had been no extraction of minerals to that date; court should have determined at time of trial whether deposits could be removed later by landowners without being impeded by easement taken by town, rather than requiring landowners to litigate question later, if and when they attempted to remove any mineral deposits.

8. **Eminent Domain ⇐131**

Generally, existence of mineral deposits in or on land is element to be considered in determining market value of such land for condemnation purposes.

9. **Eminent Domain ⇐317(2), 319**

Only perpetual easement may be taken over surface of land sought to be condemned when land is underlaid with minerals sufficiently valuable to justify extraction, and in those instances, landowner retains right to underlying minerals which condemning agency has not sought or cannot afford to buy, and landowner is entitled to later recover those minerals.

10. **Eminent Domain ⇐131**

Where landowner will be unable to later remove mineral deposits underlying land sought to be condemned because operation of condemnor impedes their removal, value of minerals left in place should be considered in determining compensation to which landowner is entitled.

11. **Eminent Domain ⇐265(5)**

Landowners whose property was subject of condemnation proceeding were not entitled to attorney fees and costs on basis of abandonment of action when town amended its complaint to seek only perpetual easement over property, inasmuch as

town's condemnation action was not both totally abandoned and dismissed prior to conclusion. U.C.A.1953, 78–34–16.

12. Eminent Domain ⇐134

Landowners whose property was subject of condemnation proceeding were not entitled to valuation of the use of the property for hunting access permits independently of, and as a separate calculation from, the land of which it was a part.

13. Eminent Domain ⇐202(4)

Evidence comparing business potential for hunting permits on property that was subject of condemnation with nearby landowner's use of hunting permits on its property was properly excluded in condemnation action due to dissimilarities in properties.

14. Eminent Domain ⇐265(3)

Trial court in condemnation action did not abuse its discretion in determining that expenses for preparation and presentation of photographic maps, graphic exhibits and transcripts of pretrial hearings that were used at trial were not taxable as costs. Rules Civ.Proc., Rule 54(d)(1); U.C.A.1953, 21–5–8.

M. Byron Fisher, Michelle Mitchell, Salt Lake City, for the Kollers.

George W. Pratt, Jody K. Burnett, Salt Lake City, for Cornish Town.

HOWE, Associate Chief Justice:

Defendants Evan O. Koller and Marlene B. Koller, his wife, appeal from a judgment for $59,670 entered on a special jury verdict in their favor and against plaintiff Cornish Town.

FACTS

Cornish Town commenced this action in July 1986 to condemn approximately one hundred acres of Kollers' land for the purpose of creating protection zones around Griffiths and Pearson Springs, which are on Kollers' property. The springs are a source of water for Cornish Town's culinary system as well as for Kollers' household. Cornish sought protection zones which cover a 1,500–foot radius around the springs in an attempt to reduce the high nitrate level in the water. Cornish also sought rights-of-way and access to the springs over another seven acres of Kollers' land. State water quality officials had advised Cornish that agricultural fertilization contributed to the high nitrate level. In response, commencing on September 24, 1981, Cornish enacted a series of ordinances authorizing the creation of these protection zones and prohibiting within them the use of pesticides and fertilizers, the keeping or grazing of animals, and human habitation.

After commencing the action, Cornish filed a motion for an order of immediate occupancy. After a three-day hearing where both parties presented evidence, the trial court granted the motion, concluding that there was competent evidence that it was "necessary and essential" that Cornish acquire the protection zones. The court further found that Cornish had not acted in bad faith and had not abused its discretion in bringing its action. Kollers filed a motion for partial summary judgment to fix the date of the taking of the property at September 24, 1981, when the first ordinance, No. 81–1, took effect. The motion was denied.

At the outset of the trial, Cornish moved to amend its complaint to seek only a perpetual easement over the one hundred acres after Kollers disclosed that they were going to claim that mineral deposits underlay the land. The amendment was granted. Kollers proffered evidence that deposits of zeolite underlay 94 acres of the property sought to be condemned, but the court would not admit that evidence or evidence that the estimated value of the deposits was $38 million, opining that their claim of mineral deposits was speculative. The court ruled that the issue of whether Kollers had a right to extract the minerals should be determined if and when they decided to mine the zeolite. Kollers also presented evidence as to wildlife resources on the land, specifically, a deer herd protected by them. However, they were not allowed to present a mathematical calcula-

tion of the potential monetary loss of future sales of hunting access permits.

Kollers attempted to present evidence that the taking would not improve the quality of the spring water. The trial court refused to hear the evidence, stating that public use and necessity had already been determined at the hearing on the motion for an order of immediate occupancy. The jury returned a special verdict in favor of Kollers for $59,670; they appeal.

I

[1] Kollers contend that the trial court erred in denying them the opportunity to present evidence at trial on the question of whether the taking by Cornish was necessary and that they were entitled to have the jury determine that issue. Cornish responds that at the hearing on the motion for an order of immediate occupancy, the court properly determined, as a matter of law, that public use and necessity had been established by Cornish and that no showing had been made of bad faith, fraud, or abuse of discretion on its part.

A

Utah Code Ann. § 78-34-4 provides in part:

> Before property can be taken it must appear:
>
> (1) That the use to which it is to be applied is a use authorized by law;
>
> (2) That the taking is necessary to such use....

Kollers' contention that they were entitled to a trial on the issue of necessity is based upon *Utah State Road Commission v. Friberg*, 687 P.2d 821, 832 (Utah 1984). In that case, this court primarily addressed the issue of the effect of delay in the prosecution of a condemnation action on the valuation of the property. We also determined that the hearing on the motion for an order of immediate occupancy was not a trial on the merits and thus res judicata did not operate. *Id.* at 833.

> An order of immediate occupancy is entered *pendente lite* and only authorizes the State to take immediate possession until a final adjudication of the merits....
>
> ....
>
> The State's right to condemn, if challenged, can finally be determined only after a trial on the merits, not at a hearing on the motion for immediate occupancy. Since an order of immediate occupancy only requires prima facie proof of the right to condemn, that order is not a final adjudication on the merits. Res judicata has no application in the absence of a final adjudication.

Id. (footnote and citations omitted).

There are important differences between the procedure followed by the trial court in *Friberg* and that followed by the trial court in the instant case. First, it appears that in *Friberg*, the state, the condemnor, presented only prima facie proof of the right to condemn at the hearing on the motion for an order of immediate occupancy. It does not appear that the condemnee presented any evidence. However, at the hearing in the instant case, both Kollers and Cornish Town introduced testimony and evidence in a three-day hearing, with Kollers vigorously challenging the necessity for the proposed taking. Second, following the hearing in *Friberg*, the order of immediate occupancy contained no findings or conclusions on the state's authority to condemn. The order stated that issues relating to the state's authority to condemn were to be decided in a "further hearing" and that the order was issued "pending further hearing and trial on the issues that may be presented in the action." *Id.* In contrast, in the instant case the trial court made and entered written findings as to the state's authority to condemn:

> 6. Although some experts may differ as to both the source of the nitrate contamination and the recommendations with respect to action which should be taken to alleviate the problem, that is not for the court to decide and there is substantial support in the record for the conclusions reached by Cornish town based on valid recommendations in doing the best they could to protect and improve the water supply. The Town has

acted reasonably and in good faith in its plan to improve the System as outlined to the Court.

7. In order to carry out its plan for improving the water supply, it is necessary and essential that Cornish acquire the protection zones in the watershed of the Griffiths Spring and Pearson Spring.

We therefore conclude that under the facts of this case, where the trial court permitted both parties to fully present and litigate the issue of the necessity of the proposed taking at the hearing on the motion for an order of immediate occupancy and entered written findings of fact sustaining the condemnor's right to condemn, the trial court was not obligated to allow the parties to again litigate that issue at trial. While it is true as pointed out in *Friberg* that an order of immediate occupancy is interlocutory and is subject to change should the trial court become convinced of the need to do so, it would be a waste of judicial resources to require a trial court to allow the condemnee to represent his evidence and arguments at trial. *Id.*

B

[2, 3] Kollers contend that they are entitled to a jury trial on the issue of necessity of the proposed taking. Utah's statutes on eminent domain, Utah Code Ann. §§ 78–34–1 to –20 (1987), are silent regarding the manner of determining necessity, i.e., whether it is done by the court or the jury. Section 78–34–8 specifically mentions the *powers of "the court or the judge thereof."* Notably, the jury's power is not mentioned:

> The court or judge thereof shall have power:
>
> (1) to hear and determine all adverse or conflicting claims to the property sought to be condemned, and to the damages therefor, and
>
> (2) to determine the respective rights of different parties seeking condemnation of the same property.

Only section 78–34–10 specifically mentions the jury:

> The court, jury or referee must hear such legal evidence as may be offered by any of the parties to the proceedings, and thereupon must ascertain and assess:
>
> (1) the value of the property sought to be condemned and all improvements thereon appertaining to the realty, and of each and every separate estate or interest therein.

Some jurisdictions specifically provide for jury trial of the issue of necessity. 1A J. Sackman & P. Rohan, *Nichols' The Law of Eminent Domain* § 4.11[4] (3d ed. 1990). Generally, however, the only question an owner is entitled to try to a jury is the amount of his compensation or damages, and he has no right to be heard by the jury on the necessity of the taking, which is a question of law for the court. 27 Am. Jur.2d *Eminent Domain* § 408, at 292 (1966); *see also Coachella Valley Water Dist. v. Western Allied Properties, Inc.*, 190 Cal.App.3d 969, 235 Cal.Rptr. 725 (1987) (pursuant to Cal. Const. art. I, § 19, the property owner in an eminent domain action is entitled to a jury trial on the question of just compensation; all other issues of fact and law must be decided by the court).[1]

It does not appear that the precise question which confronts us has been heretofore presented to this court for determination. However, dicta in two cases give support to the proposition that a landowner is not entitled to a jury determination on the question of the necessity for a proposed taking. In *Town of Perry v. Thomas*, 82 Utah 159, 22 P.2d 343 (1933), we stated, "Whether the property is being taken for a use authorized by law, that is a public use, is by statute in this state, and by the general rule of law, a judicial question and may

1. Under federal law, there is no constitutional right to a trial by jury in condemnation cases. Wright & Miller, *Federal Practice and Procedure* § 3051, rule 71A, at 120 n. 41 (Supp.1991). "Under rule 71A(h) as finally adopted, therefore, trial of all issues is by the court, except for the issue of just compensation." Wright & Miller, § 3051, at 122 n. 46; *see also United States v. 105.40 Acres of Land*, 471 F.2d 207, 212 (7th Cir.1972); *United States v. 21.54 Acres of Land*, 491 F.2d 301, 304 (4th Cir.1973).

be inquired into by the courts." 82 Utah at 165–66, 22 P.2d at 346 (citations omitted). Later, in *Bountiful v. Swift*, 535 P.2d 1236 (Utah 1975), we stated, "The trial judge, among other things, is given the power to hear and decide if the conditions precedent to taking are met." *Id.* at 1238. In both cases, we found support for those statements in a former subsection of section 78–34–8 which provided that the "court or judge thereof" shall have power to determine if the conditions precedent to taking contained in section 78–34–4 have been met, including whether the use to which the property is to be applied is a use authorized by law. That subsection was deleted from section 78–34–8 in 1981. *See* 1981 Utah Laws ch. 161, § 2. No reason for the deletion is apparent, but we have no reason to think that there was any legislative intent that the question of public use and necessity should be determined by a jury. We therefore conclude that based on what appears to be the majority rule in this country, on section 78–34–10, which limits the jury's role in condemnation cases, and dicta in former cases of this court, a landowner is not entitled to a jury determination of the public necessity of a proposed taking.

II

[4] Kollers next contend that the date of taking for purposes of assessing just compensation should be the effective date of Cornish's original ordinance, No. 81–1, which was September 24, 1981. Cornish counters that the date of the taking was appropriately held to be the date of service of summons, July 29, 1986, and that the enactment of town ordinances, including ordinances No. 81–1, No. 83–1, and No. 85–1, which it argues were never enforced, did not rise to the status of a regulatory taking.

Utah Code Ann. § 78–34–11 (1987) provides that the right to damages is deemed to accrue at the date of the service of summons:

> For the purpose of assessing compensation and damages, the right thereto shall be deemed to have accrued at the date of the service of summons, and its actual value at that date shall be the measure of compensation for all property to be actually taken, and the basis of damages to property not actually taken, but injuriously affected, in all cases where such damages are allowed....

See City of South Ogden v. Fujiki, 621 P.2d 1254, 1255 (Utah 1980); *State v. Jacobs*, 16 Utah 2d 167 n. 1, 397 P.2d 463 n. 1 (1964) (service of summons is controlling date for valuation purposes); *State ex rel. Eng'g Comm'n v. Peek*, 1 Utah 2d 263, 265 P.2d 630 (1953); *Oregon Short Line R.R. v. Jones*, 29 Utah 147, 80 P. 732 (1905).

Kollers rely on *Friberg*, 687 P.2d at 833, to support their contention. They argue that the presumption—that the date to determine valuation shall be the date of service of process—is rebutted here "by a showing that a valuation as of the date of service of summons would result in an award that would not provide 'just compensation' to a landowner." *Id.* However, the trial court specifically found that the special circumstances and factors of *Friberg* were not present here. It also determined that the enactment of ordinance No. 81–1 did not prohibit the use of Kollers' property, but rather attempted to control pollution of the town's water supply and was therefore not a regulatory taking.

In *Friberg*, the property owners argued that they were entitled to compensation and damages based on the value of their condemned property as of the date on which the state's right to condemn was finally determined—which was over seven years after service of summons. There was a substantial delay in the entry of a final decree, and the property had appreciated in value in the interim. It was stated in part III of the plurality opinion that the delay in the condemnation proceedings, which was caused by suits in the federal court to enforce compliance with federal law, should not work a penalty on the owners by denying them the appreciated value of their property. *Friberg*, 687 P.2d at 835. In part II of the *Friberg* opinion, Justice Stewart, joined by Justice Durham, stated:

> We are, of course, constrained to construe § 78–34–11 within the limitations of constitutional requirements. When valuation is fixed at a date prior to the actual taking and the value of the property increases during a prolonged condemnation proceeding so that the valuation does not reflect a fair valuation of the property and does not therefore constitute "just compensation," the statute fixing the time of valuation is unconstitutional as applied.

Id. at 829. Justice Oaks, concurring specially, disagreed with the necessity of a constitutional discussion in part II, but nevertheless concluded that the date of valuation was the later date.

In the instant case, ordinance 81–1 was effective immediately upon posting on September 24, 1981. Subsequent ordinances, all to protect Cornish's culinary water supply, were enacted in succeeding years through 1988. Upon the passage of each new ordinance, the prior ordinance was repealed. There is no evidence in the record that Cornish enforced any of these ordinances against Kollers prior to 1985. Evan Koller was contacted directly by letter dated June 11, 1985, and notified that he must comply with all terms of ordinance 85–1. However, not until July 29, 1986, was a summons and complaint in condemnation served on Kollers and the motion for an order of immediate occupancy filed with the court.

Kollers point to numerous restrictions put upon their use of the land under each of the ordinances. They argue that the value of the property in 1981 was significantly greater than its value in 1986, because Cornish first devalued the property by regulatory restrictions and then five years later commenced this condemnation action. This contention is without merit. Despite Kollers' argument, ordinance 81–1 and the succeeding ordinances had little, if any, effect on Kollers until the service of summons.

At trial, the court permitted Evan Koller to testify that crop production declined during the post-ordinance years but before the service of summons. He also testified that there had been times when the Pearson and Griffiths zones yielded as much as 100 bushels of wheat per acre, but this required application of 200-plus pounds per acre of nitrogen, which he was prohibited from doing. Nevertheless, Koller admitted that he continued to fertilize with nitrogen in the Pearson and Griffiths protection areas from 1981 to 1986, with the exception of 1982, when he applied none. In fact, Kollers' appraiser testified that their farm had one of the highest agricultural yields in Utah during that five-year period.

Kollers rely on *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987), to support their claim that they are entitled to be compensated based on the September 1981 value of the property. *First English* involved a "temporary regulatory taking" in which a subsequently invalidated county ordinance deprived a property owner of *all* uses of his land.[2] The court held that the landowner was entitled to compensation for the taking in that interim period of years before invalidation. 482 U.S. at 319, 107 S.Ct. at 2388, 96 L.Ed.2d at 266–67. The Court stated:

> We merely hold that where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.
>
> We also point out that the allegation of the complaint which we treat as true for purposes of our decision was that the ordinance in question denied appellant all use of its property.

482 U.S. at 321, 107 S.Ct. at 2389, 96 L.Ed.2d at 268.

[5] That case can easily be distinguished. Although Kollers point to ordinance 81–1, which authorized the town to

2. The appellant was unable to rebuild Lutherglen, a retreat center and recreational area for handicapped children.

restrict their use of their property, they continued their farming practices—albeit in apparent violation of that ordinance. Even a "temporary" regulatory taking would require a denial of "all uses" of their property. *First English*, 482 U.S. at 318, 107 S.Ct. at 2387, 96 L.Ed.2d at 265–66. We agree with the trial court that such a denial did not occur here.

Kollers also rely on *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987), to argue that ordinance 81–1 amounted to a taking in denial of all beneficial and economically viable use of 85 percent of their total property and decreased the value of their property by 85–90 percent. *Nollan* is unsupportive of that argument because the majority opinion did not address whether the ordinance denied the owners any economically viable uses of their land. 483 U.S. at 841–42, 107 S.Ct. at 3151, 97 L.Ed.2d at 691–93.

[6] In other case law on the subject, for there to be a taking under a zoning ordinance, the landowner must show that he has been deprived of all reasonable uses of his land. *See C.F. Lytle Co. v. Clark*, 491 F.2d 834, 838 (10th Cir.1974). For example, almost all zoning decisions have some economic impact on property values. However, mere diminution in property value is insufficient to meet the burden of demonstrating a taking by regulation. *See Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926); *Hadacheck v. Los Angeles*, 239 U.S. 394, 36 S.Ct. 143, 60 L.Ed. 348 (1915).

III

[7] Kollers next contend that the value of zeolite deposits allegedly underlying 94 acres should have been considered by the jury in determining just compensation. Their counsel proffered evidence of the deposits and that they had an estimated value of $38 million. The trial court denied Kollers the right to present this evidence to the jury, opining that the evidence was speculative inasmuch as there had been no extraction of minerals to that date. However, the judge commented that Kollers retained the right to extract any minerals and, should that right ever be denied them because of the perpetual easement taken by Cornish, they would have the right to return to court to seek further damages.

[8–10] As a general rule in this country, the existence of mineral deposits in or on land is an element to be considered in determining the market value of such land. 4 J. Sackman & P. Rohan, *Nichols' The Law of Eminent Domain* § 13.22, at 13–119 (3d ed. 1990); *see also State v. Noble*, 6 Utah 2d 40, 44, 305 P.2d 495, 499 (1957) (it is proper to admit evidence that the land contains valuable mineral deposits). Utah Code Ann. § 78–34–2 provides special protection to a landowner whose land containing valuable minerals is condemned:

> The following is a classification of the estates and rights in lands subject to being taken for public use:
>
> (1) a fee simple, when taken for public buildings or grounds or for permanent buildings, for reservoirs and dams and permanent flooding occasioned thereby, or for an outlet for a flow, or a place for the deposit of debris or tailings of a mine, mill, smelter or other place for the reduction of ores, or for solar evaporation ponds and other facilities for the recovery of minerals in solution; provided that where *surface ground is underlaid with minerals, coal or other deposits sufficiently valuable to justify extraction, only a perpetual easement may be taken over the surface ground over such deposits.*

(Italics added.) Thus, only a perpetual easement may be taken over the surface when it is underlaid with minerals "sufficiently valuable to justify extraction." In those instances, the landowner retains the rights to the underlaid minerals which the condemning agency has not sought or cannot afford to buy, and the landowner is entitled to later recover those minerals. However, where the landowner will be unable to later remove the mineral deposits because the operation of the condemnor impedes their removal, the value of the

minerals left in place should be considered in determining the compensation to which the owner is entitled. 4 J. Sackman & P. Rohan, *Nichols' The Law of Eminent Domain* § 13.22[1], at 13–144 (3d ed. 1990). In *Lomax v. Henderson*, 559 S.W.2d 466, 467 (Tex.Ct.App.1977), evidence was admitted on the diminution of the mineral owner's estate due to the taking of an easement which restricted the recovery of oil and gas on the condemned land. The court stated Texas law to be that "the ownership of minerals in place carries with it, as a necessary appurtenance thereto, the right to reasonably use so much of the surface as may be necessary to enforce and enjoy the mineral estate." *Id.* The proper measure of loss of use of the surface of the land in question is the diminution in value of the landowner's mineral estate by the taking.

The trial court denied the admission of evidence of minerals because of the speculative nature of Kollers' counsel's offer of proof. Portions of the trial transcript show the discussion between counsel and the court on this issue:

> Mr. Preston [Kollers' counsel]: If the court feels this is speculative, let me redefine our offer of proof. We're going to prove that we've drilled test holes in this property under the protection zone and the test holes go down through the topsoil, go into bentonite soil which holds water, as the court well knows and then it goes into the zeolite in the bottom. Everything is wet all the way down to the bentonite because it holds the water. When you hit the zeolite, all of a sudden it's dry powdery just like the rock we've shown here. We drilled five holes in the subject property in the Pearson Spring area. In every case the hard rock surface underneath was hit indicating that there is in fact throughout this area the zeolite that has been mentioned.
>
> We have taken samples and we have had the samples tested and the samples show that they are of commercial quality where they have been selected in the protection zone.
>
> ....
>
> Mr. Fisher [Kollers' co-counsel]: When the mine can't be built because the surface will be destroyed by the taking, then you must compensate for the mineral.
>
> The Court: But how do you know you must compensate him for mineral until you know whether it's going to do something to their rights?
>
> Mr. Fisher: Because he has told me I cannot enter the property except the three locations that are shown on that map. He told me that himself, the mayor on the stand yesterday. I cannot enter the property except at those three locations.
>
> The Court: I think it's a question to be decided if and whenever this should come up. I don't see any of us will in our lifetime ever see any bulldozer or anything out there.
>
> Mr. Fisher: I beg to differ, your Honor. I've already had two.
>
> The Court: That's my opinion.
>
> Mr. Fisher: We've already had two mineral companies approach us to mine that product after they have known of the quality of the product that's there, two of them.
>
> The Court: Okay. I'll believe it when I see it.

The trial court noted but distinguished *William Russell Coal Co. v. Board of County Commissioners*, 129 Colo. 330, 270 P.2d 772, 775 (1954), where condemnation of an easement across realty underlaid with coal was sought. Removal of the coal would allegedly impair support of the surface. The court held that the amount of damages *sustained by the owner because coal was* left in place was a question for a jury or a commission to determine, and the trial court had erred in refusing to admit such evidence. The trial court in the instant case distinguished *William Russell Coal Co.* because the extraction there was ongoing, whereas no extraction had yet occurred on Kollers' property. Such a distinction is unhelpful in light of *Montana Railway Co. v. Warren*, 137 U.S. 348, 352–53, 11 S.Ct. 96, 98, 34 L.Ed. 681, 683 (1890), in which the Court held that evidence of "in place" minerals is admissible to determine

land value. The Court commented as follows with regard to a claim that the existence of minerals was "speculative":

> Until there has been full exploiting of the vein its value is not certain, and there is an element of speculation, it must be conceded, in any estimate thereof. And yet, uncertain and speculative as it is, such "prospect" has a market value; and the absence of certainty is not a matter of which the Railroad Company can take advantage, when it seeks to enforce a sale. Contiguous to a valuable mine, with indications that the vein within such mine extends into this claim, the Railroad Company may not plead the uncertainty in respect to such extension as a ground for refusing to pay the full value which it has acquired in the market by reason of its surroundings and possibilities.

137 U.S. at 352–53, 11 S.Ct. at 98, 34 L.Ed. at 683.

This authority was recently noted with approval in *Asarco Inc. v. Kadish*, 490 U.S. 605, 628 n. 3, 109 S.Ct. 2037, 2051 n. 3, 104 L.Ed.2d 696, 722 n. 3 (1989). The Tenth Circuit has also held that expert testimony regarding in-place minerals, limestone preserves, although speculative, was clearly admissible. *United States v. 179.26 Acres of Land in Douglas County, Kansas*, 644 F.2d 367, 372–73 (10th Cir.1981).

It follows from what we have written that the trial court erred in refusing to admit evidence of the existence of the zeolite deposits and their enhancement of the value of the land sought to be condemned without first determining whether the deposits could be removed later by Kollers without being impeded by the existence of the easement taken. The trial court should have determined that question at the time of trial rather than requiring Kollers to litigate it later, if and when they attempt to remove any of the deposits. The record before us does not contain any evidence as to the methods employed in mining zeolite or whether the mining would interfere with the utility of the protection zones. The case therefore must be remanded to the trial court for a new trial on the issue of damages if the trial judge preliminarily determines that the existence of the easement taken by Cornish will either totally prevent or enhance the cost of removing the zeolite. The jury will then consider, in fixing Kollers' damages, the existence of the mineral deposits. If the trial court finds that the zeolite may be mined and removed without being prevented or impeded by the easement, a new trial on the issue of damages will be unnecessary.

However, preliminary to the determination of the question discussed above and a new trial, if necessary, the trial court should determine whether the existing water rights held by Cornish prohibit the extraction of minerals claimed by Kollers in the area of the protection zones. Both parties recognize the existence of the legal question of whether Kollers can, in any event, extract minerals from their land if in doing so it would destroy or diminish the water rights to the springs owned by Cornish. This question will need to be resolved before Kollers can establish an entitlement to extract the zeolite.

IV

[11] When the trial commenced, Cornish moved to amend its complaint to seek only a perpetual easement over the one hundred acres instead of a fee simple estate therein. Cornish asserts that it was prompted to do so because it only then learned that Kollers intended to claim that their land was underlaid with valuable mineral deposits. In view of that claim, Cornish decided that it was obligated under section 78–34–2(1), set out above, to seek only a perpetual easement. The motion to amend was granted by the trial court, and in the final order of condemnation, Cornish acquired only a perpetual easement. Kollers contended in the trial court that by amending its complaint, Cornish had abandoned the condemnation and that under section 78–34–16, they were entitled to an award of attorney fees, expenses, and costs. The trial court denied that relief.

Utah Code Ann. § 78–34–16 provides for a condemnee's recovery of all damages sustained and reasonable and necessary expenses incurred when the condemnor aban-

dons the proceedings and causes the action to be dismissed without prejudice:

> Condemnor, whether a public or private body, may, at any time prior to final payment of compensation and damages awarded the defendant by the court or jury, *abandon the proceedings and cause the action to be dismissed without prejudice*, provided, however, that as a condition of dismissal condemnor first compensate condemnee for all damages he has sustained and also reimburse him in full for all reasonable and necessary expenses actually incurred by condemnee because of the filing of the action by condemnor, including attorneys fees.

(Italics added.) We applied this statute in *Provo City Corp. v. Cropper*, 28 Utah 2d 1, 497 P.2d 629 (1972), where the condemning agency withdrew and dismissed its condemnation action before trial because the land as appraised was too expensive to acquire. The plaintiff advised the court that the defendant's property was no longer needed for public use. Consequently, the case was stricken from the trial calender, and the court made and entered an order dismissing the action without prejudice. The defendants were awarded expenses and attorney fees. This court held that the statute was controlling, and upon abandonment *and* dismissal of the action to avoid a trial, the condemnee was entitled to recover expenses and attorney fees. 28 Utah 2d at 3, 497 P.2d at 630.

In contrast, Cornish proceeded with its acquisition and did not move for dismissal of the condemnation proceedings. We interpret the statute as providing for payment of costs and fees only when the condemnation is totally abandoned *and* dismissed prior to a conclusion. Although the statute is quite liberal in covering every conceivable expense, damage, and cost in order to protect owners of private property from an unfair burden when the condemnor elects to abandon the action,[3] an actual abandonment *and* dismissal must first occur. Although the case authority from other jurisdictions cited by the Kollers allows recovery of attorney fees and expenses for partial abandonment or for abandonment in the absence of a dismissal, those cases are inapplicable here because the statutory framework in Utah is different from those jurisdictions cited.

3. Note, *The Condemnor's Liability for Damages Arising Through Instituting, Litigating or Abandoning Eminent Domain Proceedings*, 1967 Utah L.Rev. 548, 560.

V

[12] Kollers contend that they should have been permitted to introduce evidence of the value of hunting access permits in the determination of the value of the highest and best use of their property. Cornish responds that Kollers were permitted to present extensive evidence regarding the wildlife potential of the property, including evidence that the deer herd on the property added to its total value and was a factor to be considered in determining fair market value.

[13] We find no abuse of discretion. The trial court excluded only evidence which compared the business potential for hunting permits on Kollers' property with Deseret Land and Livestock's use of hunting permits on its property.[4] That exclusion was proper. *See State ex rel. Road Comm'n v. Larkin*, 27 Utah 2d 295, 299, 495 P.2d 817, 820 (1972) (court properly excluded evidence of sales of allegedly comparable property located on other interchanges of interstate highways because of dissimilarities in the properties). Cornish's counsel also objected to the presentation of Kollers' evidence as a disguised lost profits claim. *See State v. Noble*, 6 Utah 2d 40, 44, 305 P.2d 495, 498 (1957) (courts have rejected with great unanimity the proposition that just compensation is the equivalent of the total profits which would be realized from the future operations of the property; proper measure is the market value of property and not output thereof); *State v. Ouzounian*, 26 Utah 2d 442, 449, 491 P.2d 1093, 1095 (1971) (business profits are not subject of independent compensation aside and apart from market value of land on which business has been conducted). Kollers are not entitled to a valuation

4. Deseret Land & Livestock is located in Rich, Morgan, Weber, and Summit Counties in Utah and in western Wyoming, covering 200,000 acres.

of the use of the property for hunting access permits independently, as a separate calculation, of the land of which it is a part. The land was properly valued giving the wildlife resource due consideration as a component part of the land.

VI

[14] Finally, Kollers contend that they should have been awarded costs of $2,252 for preparation and presentation of photographic maps, graphic exhibits, and transcripts of pretrial hearings that were used at trial. The court awarded Kollers only $74 in taxable costs for the jury fee and a witness fee. We find no error. In *Frampton v. Wilson*, 605 P.2d 771, 774 (Utah 1980), we held that expenses for a model, photographs, and certified copies of documents which were necessary for litigation were not properly taxable as costs. Costs were defined by the court as "those fees which are required to be paid to the court and to witnesses, and for which the statutes authorize to be included in the judgment." *Id.*; Utah R.Civ.P. 54(d)(1); Utah Code Ann. § 21–5–8. Kollers argue that in *Frampton* we approved the costs of depositions in the taxing of costs and that the costs of transcripts of pretrial hearings should be similarly treated. In that case, however, this court warned that the taxing of costs of depositions is subject to limitations, i.e., depositions must be taken in good faith and essential for the development and presentation of the case. *Frampton*, 605 P.2d at 774. Further, the fact that we approved the taxing of deposition costs "was not intended and should not be taken as opening the door to other expenses." *Id.* The trial court may exercise reasonable discretion in awarding taxable costs, and we conclude that no abuse of discretion has been shown here.

This case is remanded to the trial court for further proceedings consistent with this opinion.

HALL, C.J., and STEWART, DURHAM and ZIMMERMAN, JJ., concur.

QUESTAR PIPELINE COMPANY,
Petitioner,

v.

UTAH STATE TAX COMMISSION,
Respondent.

No. 900228.

Supreme Court of Utah.

Aug. 1, 1991.

State Tax Commission issued findings of fact, conclusions of law, and final decision holding that gas used to fuel pipeline company's compressors within state of Utah was subject to state's use tax. Company filed petition for review. The Supreme Court, Durham, J., held that Commission did not violate commerce clause by applying use tax to compressor-fuel gas diverted from flowing gas in company's pipeline and consumed in fuel in company's compressors.

Affirmed.

1. Administrative Law and Procedure ⇐316, 796

Constitutional Law ⇐44

Constitutional questions are questions of law, and agency determinations of general law, including interpretations of State and Federal Constitutions, are to be reviewed under correction of error standard, giving no deference to agency's decision. U.C.A.1953, 63–46b–1 to 63–46b–22.

2. Taxation ⇐1294

Utah pipeline company, through its activities in conducting operations of a pipeline and compressors, had substantial nexus with Utah, and thus gas used to fuel those compressors was subject to Utah's use tax; company had its corporate offices in state, owned and operated extensive network of pipelines throughout state and conducted transportation, sales, and storage

DAVID H. LUCAS, Petitioner

v

SOUTH CAROLINA COASTAL COUNCIL

505 US —, 120 L Ed 2d 798, 112 S Ct 2886

[No. 91-453]

Argued March 2, 1992. Decided June 29, 1992.

Decision: South Carolina court held to have applied wrong standard in determining whether state beachfront management statute, by barring construction, effected "taking" of property under Fifth Amendment.

SUMMARY

Under 1977 legislation, the state of South Carolina required owners of certain "critical area" coastal-zone land to obtain a permit from a coastal council before changing the use of the land. In 1986, a developer purchased two lots on a barrier island—which lots did not then qualify as a "critical area" and were zoned for single-family residential construction—and made plans to erect such residences on the lots. In 1988, however, the state enacted a Beachfront Management Act (BMA) which established a new baseline on the island and prohibited any construction of occupable improvements seaward of a line parallel to and 20 feet landward of the baseline, thereby barring the developer's plans. The developer, filing suit against the council in the South Carolina Court of Common Pleas, did not challenge the validity of the BMA as an exercise of the state's police power, but contended that the BMA's complete extinguishment of the value of his property effected a "taking" of the property for which he was entitled to just compensation. The Court of Common Pleas found that the BMA decreed a permanent ban on construction on the developer's lots, where there had been no restrictions on such use before, and had thereby deprived the developer of any reasonable economic use of the lots, rendering the lots valueless; accordingly, the court ordered the council to pay just compensation of more than $1.2 million. While the case was pending before the Supreme Court of South Carolina, the BMA was amended to authorize the council, in certain circumstances, to issue special permits for construction of habitable structures seaward of the baseline. The Supreme Court of South

Carolina, reversing the judgment of the Court of Common Pleas, held that (1) in the absence of an attack on the validity of the BMA as such, the court was bound to accept the state legislature's uncontested findings that new construction in the coastal zone threatened a public resource; and (2) when a regulation respecting the use of property is designed to prevent serious public harm, no compensation is owed regardless of the regulation's effect on the property's value (304 SC 376, 404 SE2d 895).

On certiorari, the United States Supreme Court reversed and remanded. In an opinion by SCALIA, J., joined by REHNQUIST, Ch. J., and WHITE, O'CONNOR, and THOMAS, JJ., it was held that (1) the decision below was ripe for review, even though the BMA had been amended to allow the issuance of special permits and even though Supreme Court precedents reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of regulations purporting to limit such development, because although the above considerations would preclude review had the court below rested its judgment on ripeness grounds, that court had instead disposed of the developer's claim on the merits; (2) where a state seeks to sustain a regulation that deprives land of all economically beneficial use, the state may resist an asserted right to compensation under the takings clause, on the theory that there has been no "taking," only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of the owner's title to begin with, so that the severe limitation on property use is not newly legislated or decreed, but inheres in the title itself through the restrictions that background principles of the state's law of property and nuisance already place upon land ownership; (3) the court below therefore erred in rejecting the developer's claim on the merits on the basis of the state legislature's recitation of a noxious-use justification for the BMA; and (4) the case would be remanded for a determination of the state-law question whether common-law principles would have prevented the erection of any habitable or productive improvements on the developer's land.

KENNEDY, J., concurred in the judgment, expressing the view that (1) the issues presented in the case were ready for the Supreme Court's decision; (2) although the trial court's finding that the developer's property had been rendered valueless was questionable, the Supreme Court—unlike the court below on remand—had to accept the finding as entered; (3) nuisance prevention accorded with the most common expectations of owners who faced regulation, but was not the sole source of state authority to impose severe restrictions; and (4) the court below erred by reciting the general purposes for which the BMA was enacted without a determination that those purposes were in accord with the owner's reasonable expectations, and therefore sufficient to support a severe restriction on specific parcels of property.

BLACKMUN, J., dissented, expressing the view that (1) the case was not ripe for review; (2) even if there were no jurisdictional barrier, it was unwise to decide issues based on the erroneous factual premise that regulation had rendered the subject property entirely valueless; (3) the court's

decision improperly placed on state legislatures the burden of showing that their legislative judgments are correct; and (4) previous takings clause jurisprudence rested on the principle that a state has full power to prohibit an owner's use of property without compensation if such use is harmful to the public, with the determination of harmfulness resting on legislative judgment rather than on common-law nuisance principles.

STEVENS, J., dissented, expressing the view that (1) the developer was not entitled to an adjudication of the merits of his permanent takings claim under the amended BMA until he exhausted his right to apply for a special permit; (2) it was not clear whether the developer had a viable "temporary taking" claim under the preamendment BMA; (3) the doctrine of judicial restraint, under which the Supreme Court will not anticipate a question of constitutional law in advance of the necessity of deciding, properly applied to the case at hand; (4) a categorical rule that total regulatory takings must be compensated was unsupported by prior decisions, arbitrary and unsound in practice, and theoretically unjustified; and (5) the court's nuisance exception unwisely froze state common law and denied legislatures their traditional power to revise the law governing the rights and uses of property.

SOUTER, J., would have dismissed the writ of certiorari in the case as improvidently granted, because the case came to the Supreme Court on an unreviewable assumption—that the BMA deprived the developer of his entire economic interest in the property at issue—that was both questionable as a conclusion of Fifth Amendment law and sufficient to frustrate the Supreme Court's ability to render certain the legal premises on which the court's holding rested.

LUCAS v SO. CAROLINA COASTAL COUNCIL
(1992) 120 L Ed 2d 798

HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

Eminent Domain §§ 47, 98, 99 — taking — land-use regulation — abating nuisance — property rights

1a-1i. Where a state seeks to sustain a regulation that deprives land of all economically beneficial use, the state may resist an asserted

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

26 Am Jur 2d, Eminent Domain §§ 76, 85, 157

7 Federal Procedure, L Ed, Condemnation of Property §§ 14:229-14:232

5A Federal Procedural Forms, L Ed, Condemnation of Property § 13:303

7 Am Jur Pl & Pr Forms (Rev), Constitutional Law, Form 28

USCS, Constitution, Amendment 5

L Ed Digest, Appeal § 386; Eminent Domain §§ 47, 98, 99

L Ed Index, Eminent Domain

Index to Annotations, Eminent Domain

Auto-Cite®: Cases and annotations referred to herein can be further researched through the Auto-Cite® computer-assisted research service. Use Auto-Cite to check citations for form, parallel references, prior and later history, and annotation references.

ANNOTATION REFERENCES

Supreme Court's views as to what constitutes "private property" within meaning of prohibition, under Federal Constitution's Fifth Amendment, against taking of private property for public use without just compensation. 91 L Ed 2d 582.

Supreme Court's views as to what constitutes "taking," within meaning of Fifth Amendment's prohibition against taking of private property for public use without just compensation. 89 L Ed 2d 977.

Requirements of Article III of Federal Constitution as affecting standing to challenge particular conduct as violative of federal law—Supreme Court cases. 70 L Ed 2d 941.

What issues will the Supreme Court consider, though not, or not properly, raised by the parties. 42 L Ed 2d 946.

Supreme Court's view as to what is a "case or controversy" within the meaning of Article III of the Federal Constitution or an "actual controversy" within the meaning of the Declaratory Judgment Act (28 USCS § 2201). 40 L Ed 2d 783.

Local use zoning of wetlands or flood plain as taking without compensation. 19 ALR4th 756.

right to compensation under the takings clause of the Federal Constitution's Fifth Amendment, on the theory that there has been no "taking," only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of the owner's title to begin with, so that the severe limitation on property use is not newly legislated or decreed, but inheres in the title itself through the restrictions that background principles of the state's law of property and nuisance already place upon land ownership—based on an objectively reasonable application of relevant precedents, rather than artful, harm-preventing characterizations—and is merely duplicated by the regulation at issue; prior United States Supreme Court takings decisions which suggested that harmful or noxious uses of property may be proscribed by government regulation without the requirement of compensation were merely an early formulation of the police power justification necessary to sustain, without compensation, any regulatory diminution in property value, and "noxious use" logic cannot serve as a touchstone to distinguish regulatory "takings," which require compensation, from regulatory deprivations which do not require compensation; thus, a state appellate court—in considering a developer's claim that a state beachfront management statute, which prohibited any construction of occupable improvements on certain coastal lands, had deprived him of any economically viable use of beachfront lots which he had acquired with the intention of building single-family residences thereon, and thereby effected a "taking" of the land for which he was entitled to just compensation—errs in rejecting the developer's claim on the merits, on the theory that no compensation is owing under the takings clause regardless of a regulation's effect on property values when the regulation is designed to prevent serious public harm, for the state legislature's recitation of a noxious-use justification, in uncontested statutory findings that new coastal-zone construction threatened a public resource, cannot be the basis for departing from the categorical rule that total regulatory takings must always be compensated. (Blackmun and Stevens, JJ., dissented from this holding.)

Appeal §§ 386, 413; Eminent Domain § 98 — state court decision — review by Supreme Court — ripeness of federal question — land-use regulation as taking — pleadings

2a-2c. A state appellate court decision—which held that, since a state beachfront management statute was designed to protect a public resource, a developer whose beachfront property was allegedly rendered valueless by the statute's barring construction of habitable structures thereon was not entitled to just compensation for an alleged "taking" of the property—is ripe for plenary review by the United States Supreme Court on certiorari, even though the statute was amended after briefing and argument before the state appellate court to allow the issuance of special permits for construction of habitable structures on such property under certain circumstances, and even though Supreme Court precedents reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of regulations purporting to limit such development, because (1) although the

above considerations would preclude review had the state appellate court rested its judgment on ripeness grounds, the court instead disposed of the developer's takings claim on the merits; (2) this unusual disposition did not preclude the developer from applying for a permit under the amended statute and challenging any denial under the takings clause of the Federal Constitution's Fifth Amendment, but would practically and legally preclude any takings claim with respect to the loss of construction rights in the period between the statute's enactment and amendment; (3) the developer had no reason to proceed on such a "temporary taking" claim at trial, or to seek remand for that purpose prior to submission of the case to the state appellate court, because prior to the amendment the taking was unconditional and permanent; (4) given the breadth of the state appellate court's holding and judgment, the developer would be unable, absent the Supreme Court's intervention, to obtain further adjudication with respect to the period between enactment and amendment; and (5) in these circumstances, it would not accord with sound process to insist that the developer pursue the special permit procedure before his takings claim could be considered ripe, given that he had properly alleged injury-in-fact under the Constitution's Article III with respect to both the preamendment and postamendment constraints on the use of his property, and given that the state appellate court's dismissive foreclosure of further pleading and adjudication with respect to the preamendment component of the takings claim makes it appropriate to address that component as if the case were before the Supreme Court on the pleadings alone, in which posture nothing more than a proper allegation of injury-in-fact can reasonably be demanded. (Blackmun and Stevens, JJ., dissented from this holding; Souter, J., dissented in part from this holding.)

Appeal § 1692.5 — remand — eminent domain — change in law

3a, 3b. The United States Supreme Court—in reviewing on certiorari a state appellate court decision which held that, since a state beachfront management statute was designed to protect a public resource, a developer whose beachfront property was allegedly rendered valueless by the statute's barring construction of habitable structures thereon was not entitled to just compensation for an alleged "taking" of the property—is not required by "prudence" or any other principle of judicial restraint to vacate the judgment below and remand for reconsideration in the light of an amendment to the statute, which amendment allowed the issuance of special permits for construction of habitable structures on such property under certain circumstances, where the state appellate court rendered its categorical disposition of the case after the statute had been amended and after the state appellate court had been invited to consider the effect of the amendment on the case. (Blackmun, J., dissented from this holding.)

Eminent Domain § 98 — taking — land-use regulation

4a-4c. The takings clause of the Federal Constitution's Fifth Amendment is violated when land-use regulation does not substantially advance legitimate state interests or denies an owner economically viable use of his or her land.

Eminent Domain § 47 — interests in land

5a, 5b. There are a number of noneconomic interests in land whose impairment will invite exceedingly close scrutiny under the takings clause of the Federal Constitution's Fifth Amendment.

Appeal §§ 1087.5(2), 1088 — issue not raised in briefs — premise of certiorari petition

6a, 6b. The United States Supreme Court—in reviewing on certiorari a state appellate court decision which held that a developer was not entitled to just compensation for an alleged "taking" of his beachfront property by means of a state beachfront management statute, which had been found by the trial court to have rendered the property valueless by barring construction of habitable structures thereon—will not consider the argument in the respondent coastal commission's brief on the merits that the trial court's finding was erroneous, where the finding was the premise of the developer's petition for certiorari and was not challenged in the commission's brief in opposition to certiorari.

Eminent Domain § 98 — taking — property-use regulation

7a, 7b. The takings clause of the Federal Constitution's Fifth Amendment applies to regulation of property, as well as to physical deprivation of property.

Eminent Domain § 103 — taking — easement

8. The government may assert a permanent easement that was a preexisting limitation on the landowner's title, without being required to provide compensation under the takings clause of the Federal Constitution's Fifth Amendment.

Eminent Domain §§ 78, 103 — taking — lakebed — nuclear plant

9. The owner of a lakebed is not entitled to compensation, under the takings clause of the Federal Constitution's Fifth Amendment, when the owner is denied the requisite permit to engage in a landfilling operation that would have the effect of flooding others' lands, nor is the corporate owner of a nuclear power plant entitled to compensation when the owner is directed to remove all improvements from the land upon the discovery that the plant sits astride an earthquake fault, because such regulatory action, while it may have the effect of eliminating the land's only economically productive use, does not proscribe a productive use that was previously permissible under relevant property and nuisance principles.

Eminent Domain § 105 — remedy for temporary taking

10a, 10b. Under the takings clause of the Federal Constitution's Fifth Amendment, where a regulation has already worked a taking of all use of property, no subsequent action by the government, such as rescinding the regulation, can relieve the government of the duty to provide compensation for the period during which the taking was effective.

Eminent Domain § 98; Nuisances § 1 — taking — noxious uses

11. A "total taking" inquiry under the takings clause of the Federal Constitution's Fifth Amendment—which inquiry implements the rule that, where a state regulation deprives land of all economically beneficial use, the state may resist an asserted right to compensation, on the theory that there is no "taking,"

only if the proscribed use interests were not part of the owner's title to begin with due to restrictions imposed by background principles of the state's law of property and nuisance—will ordinarily entail, as the application of state nuisance law ordinarily entails, analysis of, among other things, (1) the degree of harm to public lands and resources, or adjacent private property, posed by the claimant's proposed activities on the property in question, (2) the social value of the claimant's activities and their suitability to the locality in question, and (3) the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government, or adjacent private homeowners, alike; for these purposes, the fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common-law prohibition—although changed circumstances or new knowledge may make what was previously permissible no longer so—and so also does the fact that other landowners, similarly situated, are permitted to continue the use denied to the claimant. (Blackmun and Stevens, JJ., dissented in part from this holding.)

Appeal § 1750 — remand — question to be decided

12. The United States Supreme Court—having reversed on certiorari a state appellate court decision which held that, since a state beachfront management statute was designed to protect a public resource, a developer whose beachfront property was allegedly rendered valueless by the statute's barring construction of habitable structures thereon was not entitled to just compensation for an alleged "taking" of the property—will remand the case to the state appellate court to determine the state-law question whether common-law principles would have prevented the erection of any habitable or productive improvements on the developer's land, where the Supreme Court rules that when a state regulation deprives land of all economically beneficial use, the state may resist an asserted right to compensation, on the theory that there is no "taking," only if the proscribed use interests were not part of the owner's title to begin with due to restrictions imposed by background principles of the state's law of property and nuisance.

SYLLABUS BY REPORTER OF DECISIONS

In 1986, petitioner Lucas bought two residential lots on a South Carolina barrier island, intending to build single-family homes such as those on the immediately adjacent parcels. At that time, Lucas's lots were not subject to the State's coastal zone building permit requirements. In 1988, however, the state legislature enacted the Beachfront Management Act, which barred Lucas from erecting any permanent habitable structures on his parcels. He filed suit against respondent state agency, contending that, even though the Act may have been a lawful exercise of the State's police power, the ban on construction deprived him of all "economically viable use" of his property and therefore effected a "taking" under the Fifth and Fourteenth Amendments that required the payment of just compensation See, e.g., Agins v Tiburon, 447 US 255, 261, 65 L Ed 2d

106, 100 S Ct 2138. The state trial court agreed, finding that the ban rendered Lucas's parcels "valueless," and entered an award exceeding $1.2 million. In reversing, the State Supreme Court held itself bound, in light of Lucas's failure to attack the Act's validity, to accept the legislature's "uncontested . . findings" that new construction in the coastal zone threatened a valuable public resource. The court ruled that, under the Mugler v Kansas, 123 US 623, 31 L Ed 205, 8 S Ct 273, line of cases, when a regulation is designed to prevent "harmful or noxious uses" of property akin to public nuisances, no compensation is owing under the Takings Clause regardless of the regulation's effect on the property's value.

Held:

1. Lucas's takings claim is not rendered unripe by the fact that he may yet be able to secure a special permit to build on his property under an amendment to the Act passed after briefing and argument before the State Supreme Court, but prior to issuance of that court's opinion. Because it declined to rest its judgment on ripeness grounds, preferring to dispose of the case on the merits, the latter court's decision precludes, both practically and legally, any takings claim with respect to Lucas's preamendment deprivation. Lucas has properly alleged injury-in-fact with respect to this preamendment deprivation, and it would not accord with sound process in these circumstances to insist that he pursue the late-created procedure before that component of his takings claim can be considered ripe.

2. The State Supreme Court erred in applying the "harmful or noxious uses" principle to decide this case.

(a) Regulations that deny the property owner all "economically viable use of his land" constitute one of the discrete categories of regulatory deprivations that require compensation without the usual case-specific inquiry into the public interest advanced in support of the restraint. Although the Court has never set forth the justification for this categorical rule, the practical—and economic— equivalence of physically appropriating and eliminating all beneficial use of land counsels its preservation.

(b) A review of the relevant decisions demonstrates that the "harmful or noxious use" principle was merely this Court's early formulation of the police power justification necessary to sustain (without compensation) *any* regulatory diminution in value; that the distinction between regulation that "prevents harmful use" and that which "confers benefits" is difficult, if not impossible, to discern on an objective, value-free basis; and that, therefore, noxious-use logic cannot be the basis for departing from this Court's categorical rule that total regulatory takings must be compensated.

(c) Rather, the question must turn, in accord with this Court's "takings" jurisprudence, on citizens' historic understandings regarding the content of, and the State's power over, the "bundle of rights" that they acquire when they take title to property. Because it is not consistent with the historical compact embodied in the Takings Clause that title to real estate is held subject to the State's subsequent decision to eliminate all economically beneficial use, a regulation having that effect cannot be newly decreed, and sustained, without compensation's being paid

the owner. However, no compensation is owed—in this setting as with all takings claims—if the State's affirmative decree simply makes explicit what already inheres in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership. Cf. Scranton v Wheeler, 179 US 141, 163, 45 L Ed 126, 21 S Ct 48.

(d) Although it seems unlikely that common-law principles would have prevented the erection of any habitable or productive improvements on Lucas's land, this state-law question must be dealt with on remand. To win its case, respondent cannot simply proffer the legislature's declaration that the uses Lucas desires are inconsistent with the public interest, or the conclusory assertion that they violate a common-law maxim such as sic utere tuo ut alienum non laedas, but must identify background principles of nuisance and property law that prohibit the uses Lucas now intends in the property's present circumstances.

304 SC 376, 404 SE2d 895, reversed and remanded.

Scalia, J., delivered the opinion of the Court, in which Rehnquist, C. J., and White, O'Connor, and Thomas, JJ., joined. Kennedy, J., filed an opinion concurring in the judgment. Blackmun, J., and Stevens, J., filed dissenting opinions. Souter, J., filed a separate statement.

APPEARANCES OF COUNSEL

A. Camden Lewis argued the cause for petitioner.

C. C. Harness, III argued the cause for respondent.

OPINION OF THE COURT

Justice **Scalia** delivered the opinion of the Court.

[1a] In 1986, petitioner David H. Lucas paid $975,000 for two residential lots on the Isle of Palms in Charleston County, South Carolina, on which he intended to build single-family homes. In 1988, however, the South Carolina Legislature enacted the Beachfront Management Act, SC Code § 48-39-250 et seq. (Supp 1990) (Act), which had the direct effect of barring petitioner from erecting any permanent habitable structures on his two parcels. See § 48-39-290(A). A state trial court found that this prohibition rendered Lucas's parcels "valueless." App to Pet for Cert 37. This case requires us to decide whether the Act's dramatic effect on the economic value of Lucas's lots accomplished a taking of private property under the Fifth and Fourteenth Amendments requiring the payment of "just compensation." US Const, Amdt 5

I

A

South Carolina's expressed interest in intensively managing development activities in the so-called "coastal zone" dates from 1977 when, in the aftermath of Congress's passage of the federal Coastal Zone Management Act of 1972, 86 Stat 1280, as amended, 16 USC § 1451 et seq. [16 USCS §§ 1451 et seq.], the legislature enacted a Coastal Zone Management Act of its own. See SC Code § 48-39-10 et seq. (1987). In its original form, the South Carolina Act required owners of coastal zone

land that qualified as a "critical area" (defined in the legislation to include beaches and immediately adjacent sand dunes, § 48-39-10(J)) to obtain a permit from the newly created South Carolina Coastal Council (respondent here) prior to committing the land to a "use other than the use the critical area was devoted to on [September 28, 1977]." § 48-39-130(A).

In the late 1970's, Lucas and others began extensive residential development of the Isle of Palms, a barrier island situated eastward of the City of Charleston. Toward the close of the development cycle for one residential subdivision known as "Beachwood East," Lucas in 1986 purchased the two lots at issue in this litigation for his own account. No portion of the lots, which were located approximately 300 feet from the beach, qualified as a "critical area" under the 1977 Act; accordingly, at the time Lucas acquired these parcels, he was not legally obliged to obtain a permit from the Council in advance of any development activity. His intention with respect to the lots was to do what the owners of the immediately adjacent parcels had already done: erect single-family residences. He commissioned architectural drawings for this purpose.

The Beachfront Management Act brought Lucas's plans to an abrupt end. Under that 1988 legislation, the Council was directed to establish a "baseline" connecting the landward-most "point[s] of erosion . . . during the past forty years" in the region of the Isle of Palms that includes Lucas's lots. § 48-39-280(A)(2) (Supp 1988).[1] In action not challenged here, the Council fixed this baseline landward of Lucas's parcels. That was significant, for under the Act construction of occupable improvements[2] was flatly prohibited seaward of a line drawn 20 feet landward of, and parallel to, the baseline, § 48-39-290(A) (Supp 1988). The Act provided no exceptions.

B

Lucas promptly filed suit in the South Carolina Court of Common Pleas, contending that the Beachfront Management Act's construction bar effected a taking of his property without just compensation. Lucas did not take issue with the validity of the Act as a lawful exercise of South Carolina's police power, but contended that the Act's complete extinguishment of his property's value entitled him to compensation regardless of whether the legislature had acted in furtherance of legitimate police power objectives. Following a bench trial, the court agreed. Among its factual determinations was the finding that "at the time Lucas purchased the two lots,

1. This specialized historical method of determining the baseline applied because the Beachwood East subdivision is located adjacent to a so-called "inlet erosion zone" (defined in the Act to mean "a segment of shoreline along or adjacent to tidal inlets which is influenced directly by the inlet and its associated shoals," SC Code § 48-39-270(7) (Supp 1988)) that is "not stabilized by jetties, terminal groins, or other structures," § 48-39-280(A)(2). For areas other than these unstabilized inlet erosion zones, the statute directs that the baseline be established "along the crest of the primary oceanfront sand dune." § 48-39-280(A)(1).

2. The Act did allow the construction of certain nonhabitable improvements, e.g., "wooden walkways no larger in width than six feet," and "small wooden decks no larger than one hundred forty-four square feet." §§ 48-39-290(A)(1) and (2) (Supp 1988).

both were zoned for singlefamily residential construction and . . . there were no restrictions imposed upon such use of the property by either the State of South Carolina, the County of Charleston, or the Town of the Isle of Palms." App to Pet for Cert 36. The trial court further found that the Beachfront Management Act decreed a permanent ban on construction insofar as Lucas's lots were concerned, and that this prohibition "deprive[d] Lucas of any reasonable economic use of the lots, . . . eliminated the unrestricted right of use, and render[ed] them valueless." Id., at 37. The court thus concluded that Lucas's properties had been "taken" by operation of the Act, and it ordered respondent to pay "just compensation" in the amount of $1,232,387.50. Id., at 40.

The Supreme Court of South Carolina reversed. It found dispositive what it described as Lucas's concession "that the Beachfront Management Act [was] properly and validly designed to preserve . . . South Carolina's beaches." 304 SC 376, 379, 404 SE2d 895, 896 (1991). Failing an attack on the validity of the statute as such, the court believed itself bound to accept the "uncontested . . . findings" of the South Carolina legislature that new construction in the coastal zone—such as petitioner intended—threatened this public resource. Id., at 383, 404 SE2d, at 898. The Court ruled that when a regulation respecting the use of property is designed "to prevent serious public harm," id., at 383, 404 SE2d, at 899 (citing, inter alia, Mugler v Kansas, 123 US 623, 31 L Ed 205, 8 S Ct 273 (1887)), no compensation is owing under the Takings Clause regardless of the regulation's effect on the property's value

Two justices dissented. They acknowledged that our Mugler line of cases recognizes governmental power to prohibit "noxious" uses of property—i.e., uses of property akin to "public nuisances"—without having to pay compensation. But they would not have characterized the Beachfront Management Act's *"primary* purpose [as] the prevention of a nuisance." 304 SC, at 395, 404 SE2d, at 906 (Harwell, J., dissenting). To the dissenters, the chief purposes of the legislation, among them the promotion of tourism and the creation of a "habitat for indigenous flora and fauna," could not fairly be compared to nuisance abatement. Id., at 396, 404 SE2d, at 906. As a consequence, they would have affirmed the trial court's conclusion that the Act's obliteration of the value of petitioner's lots accomplished a taking.

We granted certiorari. 502 US ——, 116 L Ed 2d 455, 112 S Ct 436 (1991).

II

[2a] As a threshold matter, we must briefly address the Council's suggestion that this case is inappropriate for plenary review. After briefing and argument before the South Carolina Supreme Court, but prior to issuance of that court's opinion, the Beachfront Management Act was amended to authorize the Council, in certain circumstances, to issue "special permits" for the construction or reconstruction of habitable structures seaward of the baseline. See SC Code § 48-39-290(D)(1) (Supp 1991). According to the Council, this amendment renders Lucas's claim of a permanent deprivation unripe, as Lucas may yet be able to secure permission to build on his property. "[The Court's] cases," we

are reminded, "uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it." MacDonald, Sommer & Frates v County of Yolo, 477 US 340, 351, 91 L Ed 2d 285, 106 S Ct 2561 (1986). See also Agins v Tiburon, 447 US 255, 260, 65 L Ed 2d 106, 100 S Ct 2138 (1980). Because petitioner "has not yet obtained a final decision regarding how [he] will be allowed to develop [his] property," Williamson County Regional Planning Comm'n of Johnson City v Hamilton Bank, 473 US 172, 190, 87 L Ed 2d 126, 105 S Ct 3108 (1985), the Council argues that he is not yet entitled to definitive adjudication of his takings claim in this Court.

We think these considerations would preclude review had the South Carolina Supreme Court rested its judgment on ripeness grounds, as it was (essentially) invited to do by the Council, see Brief for Respondent 9, n 3. The South Carolina Supreme Court shrugged off the possibility of further administrative and trial proceedings, however, preferring to dispose of Lucas's takings claim on the merits. Compare, e.g., San Diego Gas & Electric Co., 450 US 621, 631-632, 67 L Ed 2d 551, 101 S Ct 1287 (1981). This unusual disposition does not preclude Lucas from applying for a permit under the 1990 amendment for *future* construction, and challenging, on takings grounds, any denial. But it does preclude, both practically and legally, any takings claim with respect to Lucas's past deprivation, i. e., for his having been denied construction rights during the period before the 1990 amendment. See generally First English Evangelical Lutheran Church of Glendale v County of Los Angeles, 482 US 304, 96 L Ed 2d 250, 107 S Ct 2378 (1987) (holding that temporary deprivations of use are compensable under the Takings Clause). Without even so much as commenting upon the consequences of the South Carolina Supreme Court's judgment in this respect, the Council insists that permitting Lucas to press his claim of a past deprivation on this appeal would be improper, since "the issues of whether and to what extent [Lucas] has incurred a temporary taking . . . have simply never been addressed." Brief for Respondent 11. Yet Lucas had no reason to proceed on a "temporary taking" theory at trial, or even to seek remand for that purpose prior to submission of the case to the South Carolina Supreme Court, since as the Act then read, the taking was unconditional and permanent. Moreover, given the breadth of the South Carolina Supreme Court's holding and judgment, Lucas would plainly be unable (absent our intervention now) to obtain further state-court adjudication with respect to the 1988-1990 period.

[2b, 3a] In these circumstances, we think it would not accord with sound process to insist that Lucas pursue the late-created "special permit" procedure before his takings claim can be considered ripe. Lucas has properly alleged Article III injury-in-fact in this case, with respect to both the pre-1990 and post-1990 constraints placed on the use of his parcels by the Beachfront Management Act.[3] That there is a discre-

3. **[2c]** Justice Blackmun insists that this aspect of Lucas's claim is "not justiciable," post, at ——, 120 L Ed 2d, at 829, because Lucas never fulfilled his obligation under Wil-

tionary "special permit" procedure by which he may regain—for the future, at least—beneficial use of his land goes only to the prudential "ripeness" of Lucas's challenge, and for the reasons discussed we do not think it prudent to apply that prudential requirement here. See Esposito v South Carolina Coastal Council, 939 F2d 165, 168 (CA4 1991), cert pending, No. 91-941.[4] We leave for decision on remand, of course, the questions left unaddressed by the South Carolina Supreme Court as a consequence of its categorical disposition.[5]

Jamison County Regional Planning Comm'n v Hamilton Bank of Johnson City, 473 US 172, 87 L Ed 2d 126, 105 S Ct 3108 (1985), to "submit[] a plan for development of [his] property" to the proper state authorities. Id., at 187, 87 L Ed 2d 126, 105 S Ct 3108. See post, at ——, 120 L Ed 2d, at 830. But such a submission would have been pointless, as the Council stipulated below that no building permit would have been issued under the 1988 Act, application or no application. Record 14 (stipulations). Nor does the peculiar posture of this case mean that we are without Article III jurisdiction, as Justice Blackmun apparently believes, see post, at ——, 120 L Ed 2d, at 830, and n 5. Given the South Carolina Supreme Court's dismissive foreclosure of further pleading and adjudication with respect to the pre-1990 component of Lucas's taking claim, it is appropriate for us to address that component as if the case were here on the pleadings alone. Lucas properly alleged injury-in-fact in his complaint, see App to Pet for Cert 154 (complaint); id., at 156 (asking "damages for the temporary taking of his property" from the date of the 1988 Act's passage to "such time as this matter is finally resolved"). No more can reasonably be demanded. Cf. First English Evangelical Lutheran Church of Glendale v County of Los Angeles, 482 US 304, 312-313, 96 L Ed 2d 250, 107 S Ct 2378 (1987). Justice Blackmun finds it "baffling," post, at ——, n 5, 120 L Ed 2d, at 830, that we grant standing here, whereas "just a few days ago, in Lujan v Defenders of Wildlife, 504 US —— 119 L Ed 2d 351, 112 S Ct —— (1992)," we denied standing. He sees in that strong evidence to support his repeated imputations that the Court "presses" to take this case, post, at ——, 120 L Ed 2d, at 826, is "eager to decide" it, post, at ——, 120 L Ed 2d, at 831, and is unwilling to "be denied," post, at ——, 120 L Ed 2d, at 829. He has a point: The decisions are indeed very close in time, yet one grants standing and the other denies it. The distinction, however, rests in law rather than chronology. Lujan, since it involved the establishment of injury-in-fact at the *summary judgment stage*, required specific facts to be adduced by sworn testimony; had the same challenge to a generalized allegation of injury-in-fact been made at the pleading stage, it would have been unsuccessful.

4. In that case, the Court of Appeals for the Fourth Circuit reached the merits of a takings challenge to the 1988 Beachfront Management Act identical to the one Lucas brings here even though the Act was amended, and the special permit procedure established, while the case was under submission. The court observed:

"The enactment of the 1990 Act during the pendency of this appeal, with its provisions for special permits and other changes that may affect the plaintiffs, does not relieve us of the need to address the plaintiffs' claims under the provisions of the 1988 Act. Even if the amended Act cured all of the plaintiffs' concerns, the amendments would not foreclose the possibility that a taking had occurred during the years when the 1988 Act was in effect." Esposito v South Carolina Coastal Council, 939 F2d 165, 168 (CA4 1991).

5. **[3b]** Justice Blackmun states that our "intense interest in Lucas' plight . . . would have been more prudently expressed by vacating the judgment below and remanding for further consideration in light of the 1990 amendments" to the Beachfront Management Act. Post, at ——, n 7, 120 L Ed 2d, at 831. That is a strange suggestion, given that the South Carolina Supreme Court rendered its categorical disposition in this case *after* the Act had been amended, and *after* it had been invited to consider the effect of those amendments on Lucas's case. We have no reason to believe that the justices of the South Carolina Supreme Court are any more desirous of using a narrower ground now than they were then; and neither "prudence" nor any other principle of judicial restraint requires that we remand to find out whether they have changed their mind.

III

A

Prior to Justice Holmes' exposition in Pennsylvania Coal Co. v Mahon, 260 US 393, 67 L Ed 322, 43 S Ct 158, 28 ALR 1321 (1922), it was generally thought that the Takings Clause reached only a "direct appropriation" of property, Legal Tender Cases, 12 Wall 457, 551, 20 L Ed 287 (1871), or the functional equivalent of a "practical ouster of [the owner's] possession." Transportation Co. v Chicago, 99 US 635, 642, 25 L Ed 336 (1879). See also Gibson v United States, 166 US 269, 275-276, 41 L Ed 996, 17 S Ct 578 (1897). Justice Holmes recognized in Mahon, however, that if the protection against physical appropriations of private property was to be meaningfully enforced, the government's power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits. 260 US, at 414-415, 67 L Ed 322, 43 S Ct 158, 28 ALR 1321. If, instead, the uses of private property were subject to unbridled, uncompensated qualification under the police power, "the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappear[ed]." Id., at 415, 67 L Ed 322, 43 S Ct 158, 28 ALR 1321. These considerations gave birth in that case to the oft-cited maxim that, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." Ibid.

Nevertheless, our decision in Mahon offered little insight into when, and under what circumstances, a given regulation would be seen as going "too far" for purposes of the Fifth Amendment. In 70-odd years of succeeding "regulatory takings" jurisprudence, we have generally eschewed any "'set formula'" for determining how far is too far, preferring to "engag[e] in . . . essentially ad hoc, factual inquiries," Penn Central Transportation Co. v New York City, 438 US 104, 124, 57 L Ed 2d 631, 98 S Ct 2646 (1978) (quoting Goldblatt v Hempstead, 369 US 590, 594, 8 L Ed 2d 130, 82 S Ct 987 (1962)). See Epstein, Takings: Descent and Resurrection, 1987 Sup Ct Rev 1, 4. We have, however, described at least two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint. The first encompasses regulations that compel the property owner to suffer a physical "invasion" of his property. In general (at least with regard to permanent invasions), no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation. For example, in Loretto v Teleprompter Manhattan CATV Corp., 458 US 419, 73 L Ed 2d 868, 102 S Ct 3164 (1982), we determined that New York's law requiring landlords to allow television cable companies to emplace cable facilities in their apartment buildings constituted a taking, id., at 435-440, 73 L Ed 2d 868, 102 S Ct 3164, even though the facilities occupied at most only 1½ cubic feet of the landlords' property, see id., at 438, n 16, 73 L Ed 2d 868, 102 S Ct 3164. See also United States v Causby, 328 US 256, 265, and n 10, 90 L Ed 1206, 66 S Ct 1062 (1946) (physical invasions of airspace); cf. Kaiser Aetna v United States, 444 US 164, 62 L Ed 2d 332, 100 S Ct 383 (1979) (imposition of

navigational servitude upon private marinas).

[4a] The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land. See Agins, 447 US, at 260, 65 L Ed 2d 106, 100 S Ct 2138; see also Nollan v California Coastal Comm'n, 483 US 825, 834, 97 L Ed 2d 677, 107 S Ct 3141 (1987); Keystone Bituminous Coal Assn. v DeBenedictis, 480 US 470, 495, 94 L Ed 2d 472, 107 S Ct 1232 (1987); Hodel v Virginia Surface Mining & Reclamation Assn., Inc., 452 US 264, 295-296, 69 L Ed 2d 1, 101 S Ct 2352 (1981).[6] As we have said on numerous occasions, the Fifth Amendment is violated when landuse regulation "does not substantially advance legitimate state interests *or denies an owner economically viable use of his land.*" Agins, supra, at 260, 65 L Ed 2d 106, 100 S Ct 2138 (citations omitted) (emphasis added).[7]

---

6. We will not attempt to respond to all of Justice Blackmun's mistaken citation of case precedent. Characteristic of its nature is his assertion that the cases we discuss here stand merely for the proposition "that proof that a regulation does *not* deny an owner economic use of his property is sufficient to defeat a facial taking challenge" and not for the point that "*denial* of such use is sufficient to establish a taking claim regardless of any other consideration." Post, at ——, n 11, 120 L Ed 2d, at 835. The cases say, repeatedly and unmistakably, that "'[t]he test to be applied in considering [a] facial [takings] challenge is fairly straightforward. A statute regulating the uses that can be made of property *effects a taking if it "denies an owner economically viable use of his land."*'" Keystone, 480 US, at 495, 94 L Ed 2d 472, 107 S Ct 1232 (quoting Hodel, 452 US, at 295-296, 69 L Ed 2d 1, 101 S Ct 2352 (quoting Agins, 447 US, at 260)) (emphasis added).

[4b] Justice Blackmun describes that rule (which we do not invent but merely apply today) as "alter[ing] the long-settled rules of review" by foisting on the State "the burden of showing [its] regulation is not a taking." Post, at ——, ——, 120 L Ed 2d, at 832. This is of course wrong. Lucas had to do more than simply file a lawsuit to establish his constitutional entitlement; he had to show that the Beachfront Management Act denied him economically beneficial use of his land. Our analysis presumes the unconstitutionality of state land-use regulation only in the sense that *any* rule-with-exceptions presumes the invalidity of a law that violates it—for example, the rule generally prohibiting content-based restrictions on speech. See, e.g., Simon & Schuster, Inc. v New York Crime Victims Board, 502 US ——, ——, 116 L Ed 2d 476, 112 S Ct 501 (1991) ("A statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech"). Justice Blackmun's real quarrel is with the substantive standard of liability we apply in this case, a long-established standard we see no need to repudiate.

7. Regrettably, the rhetorical force of our "deprivation of all economically feasible use" rule is greater than its precision, since the rule does not make clear the "property interest" against which the loss of value is to be measured. When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole. (For an extreme —and, we think, unsupportable—view of the relevant calculus, see Penn Central Transportation Co. v New York City, 42 NY2d 324, 333-334, 366 NE2d 1271, 1276-1277 (1977), aff'd, 438 US 104, 57 L Ed 2d 631, 98 S Ct 2646 (1978), where the state court examined the diminution in a particular parcel's value produced by a municipal ordinance in light of total value of the taking claimant's other holdings in the vicinity.) Unsurprisingly, this uncertainty regarding the composition of the denominator in our "deprivation" fraction has produced inconsistent pronouncements by the Court. Compare Pennsylvania Coal Co. v Mahon, 260 US 393, 414, 67 L Ed 322, 43 S Ct 158, 28 ALR 1321 (1922) (law restricting subsurface extraction of coal held to effect a taking), with Keystone Bituminous Coal Assn. v DeBenedictis, 480 US 470, 497-502, 94 L Ed

We have never set forth the justification for this rule. Perhaps it is simply, as Justice Brennan suggested, that total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation. See San Diego Gas & Electric Co. v San Diego, 450 US, at 652, 67 L Ed 2d 551, 101 S Ct 1287 (Brennan, J., dissenting). "[F]or what is the land but the profits thereof[?]" 1 E. Coke, Institutes ch 1, § 1 (1st Am ed 1812). Surely, at least, in the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted, it is less realistic to indulge our usual assumption that the legislature is simply "adjusting the benefits and burdens of economic life," Penn Central Transportation Co., 438 US, at 124, 57 L Ed 2d 631, 98 S Ct 2646, in a manner that secures an "average reciprocity of advantage" to everyone concerned. Pennsylvania Coal Co. v Mahon, 260 US, at 415, 67 L Ed 322, 43 S Ct 158, 28 ALR 1321. And the *functional* basis for permitting the government, by regulation, to affect property values without compensation—that "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law," id., at 413, 67 L Ed 322, 43 S Ct 158, 28 ALR 1321—does not apply to the relatively rare situations where the government has deprived a landowner of all economically beneficial uses.

On the other side of the balance, affirmatively supporting a compensation requirement, is the fact that regulations that leave the owner of land without economically beneficial or productive options for its use—typically, as here, by requiring land to be left substantially in its natural state—carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm. See, e.g., Annicelli v South Kingstown, 463 A2d 133, 140-141 (RI 1983) (prohibition on construction adjacent to beach justified on twin grounds of safety and "conservation of open space"); Morris County Land Improvement Co. v Parsippany-Troy Hills Township, 40 NJ 539, 552-553, 193 A2d 232, 240 (1963) (prohibition on filling marshlands imposed in order to preserve region as water detention basin and create wildlife refuge). As Justice Brennan explained: "From the government's point of view, the benefits flowing to the public from preservation of open space through regulation may be equally great as from creating a wildlife refuge through formal condemnation or increasing electricity production

2d 472, 107 S Ct 1232 (1987) (nearly identical law held not to effect a taking); see also id., at 515-520, 94 L Ed 2d 472, 107 S Ct 1232 (Rehnquist, C.J., dissenting); Rose, Mahon Reconstructed: Why the Takings Issue is Still a Muddle, 57 S Cal L Rev 561, 566-569 (1984). The answer to this difficult question may lie in how the owner's reasonable expectations have been shaped by the State's law of property—i. e., whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value. In any event, we avoid this difficulty in the present case, since the "interest in land" that Lucas has pleaded (a fee simple interest) is an estate with a rich tradition of protection at common law, and since the South Carolina Court of Common Pleas found that the Beachfront Management Act left each of Lucas's beachfront lots without economic value.

through a dam project that floods private property." San Diego Gas & Elec. Co., supra, at 652, 67 L Ed 2d 551, 101 S Ct 1287 (Brennan, J., dissenting). The many statutes on the books, both state and federal, that provide for the use of eminent domain to impose servitudes on private scenic lands preventing developmental uses, or to acquire such lands altogether, suggest the practical equivalence in this setting of negative regulation and appropriation. See, e.g., 16 USC § 410ff-1(a) [16 USCS § 410ff-1(a)] (authorizing acquisition of "lands, waters, or interests [within Channel Islands National Park] (including but not limited to scenic easements)"); § 460aa-2(a) (authorizing acquisition of "any lands, or lesser interests therein, including mineral interests and scenic easements" within Sawtooth National Recreation Area); §§ 3921-3923 (authorizing acquisition of wetlands); NC Gen Stat § 113A-38 (1990) (authorizing acquisition of, inter alia, "'scenic easements'" within the North Carolina natural and scenic rivers system); Tenn Code Ann §§ 11-15-101—11-15-108 (1987) (authorizing acquisition of "protective easements" and other rights in real property adjacent to State's historic, architectural, archaeological, or cultural resources).

[4c, 5a] We think, in short, that there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.[8]

B

[6a] The trial court found Lucas's two beachfront lots to have been rendered valueless by respondent's enforcement of the coastal-zone con-

8. Justice Stevens criticizes the "deprivation of all economically beneficial use" rule as "wholly arbitrary", in that "[the] landowner whose property is diminished in value 95% recovers nothing," while the landowner who suffers a complete elimination of value "recovers the land's full value." Post, at ——, 120 L Ed 2d, at 844. This analysis errs in its assumption that the landowner whose deprivation is one step short of complete is not entitled to compensation. Such an owner might not be able to claim the benefit of our categorical formulation, but, as we have acknowledged time and again, "[t]he economic impact of the regulation on the claimant and . . . the extent to which the regulation has interfered with distinct investment-backed expectations" are keenly relevant to takings analysis generally. Penn Central Transportation Co. v New York City, 438 US 104, 124, 57 L Ed 2d 631, 98 S Ct 2646 (1978). It is true that in at least *some cases* the landowner with 95% loss will get nothing, while the landowner with total loss will recover in full. But that occasional result is no more strange than the gross disparity between the landowner whose premises are taken for a highway (who recovers in full) and the landowner whose property is reduced to 5% of its former value by the highway (who recovers nothing). Takings law is full of these "all-or-nothing" situations.

[5b] Justice Stevens similarly misinterprets our focus on "developmental" uses of property (the uses proscribed by the Beachfront Management Act) as betraying an "assumption that the only uses of property cognizable under the Constitution are *developmental* uses." Post, at ——, n 3, 120 L Ed 2d, at 844. We make no such assumption. Though our prior takings cases evince an abiding concern for the productive use of, and economic investment in, land, there are plainly a number of noneconomic interests in land whose impairment will invite exceedingly close scrutiny under the Takings Clause. See, e.g., Loretto v Teleprompter Manhattan CATV Corp., 458 US 419, 436, 73 L Ed 2d 868, 102 S Ct 3164 (1982) (interest in excluding strangers from one's land).

struction ban.[9] Under Lucas's theory of the case, which rested upon our "no economically viable use" statements, that finding entitled him to compensation. Lucas believed it unnecessary to take issue with either the purposes behind the Beachfront Management Act, or the means chosen by the South Carolina Legislature to effectuate those purposes. The South Carolina Supreme Court, however, thought otherwise. In its view, the Beachfront Management Act was no ordinary enactment, but involved an exercise of South Carolina's "police powers" to mitigate the harm to the public interest that petitioner's use of his land might occasion. 304 SC, at 384, 404 SE2d, at 899 By neglecting to dispute the findings enumerated in the Act[10] or otherwise to challenge the legislature's purposes, petitioner "conceded[d] that the beach/dune area of

9. [6b] This finding was the premise of the Petition for Certiorari, and since it was not challenged in the Brief in Opposition we decline to entertain the argument in respondent's brief on the merits, see Brief for Respondent 45-50, that the finding was erroneous Instead, we decide the question presented under the same factual assumptions as did the Supreme Court of South Carolina. See Oklahoma City v Tuttle, 471 US 808, 816, 85 L Ed 2d 791, 105 S Ct 2427 (1985)

10. The legislature's express findings include the following

' The General Assembly finds that·

"(1) The beach/dune system along the coast of South Carolina is extremely important to the people of this State and serves the following functions.

"(a) protects life and property by serving as a storm barrier which dissipates wave energy and contributes toshoreline stability in an economical and effective manner.

"(b) provides the basis for a tourism industry that generates approximately two-thirds of South Carolina's annual tourism industry revenue which constitutes a significant portion of the state's economy The tourists who come to the South Carolina coast to enjoy the ocean and dry sand beach contribute significantly to state and local tax revenues;

"(c) provides habitat for numerous species of plants and animals, several of which are threatened or endangered Waters adjacent to the beach/dune system also provide habitat for many other marine species,

"(d) provides a natural health environment for the citizens of South Carolina to spend leisure time which serves their physical and mental well-being

"(2) Beach/dune system vegetation is unique and extremely important to the vitality and preservation of the system

"(3) Many miles of South Carolina's beaches have been identified as critically eroding.

"(4) [D]evelopment unwisely has been sited too close to the [beach/dune] system This type of development has jeopardized the stability of the beach/dune system, accelerated erosion, and endangered adjacent property. It is in both the public and private interests to protect the system from this unwise development.

"(5) The use of armoring in the form of hard erosion control devices such as seawalls, bulkheads, and rip-rap to protect erosion-threatened structures adjacent to the beach has not proven effective These armoring devices have given a false sense of security to beachfront property owners In reality, these hard structures, in many instances, have increased the vulnerability of beachfront property to damage from wind and waves while contributing to the deterioration and loss of the dry sand beach which is so important to the tourism industry

"(6) Erosion is a natural process which becomes a significant problem for man only when structures are erected in close proximity to the beach/dune system It is in both the public and private interests to afford the beach/dune system space to accrete and erode in its natural cycle This space can be provided only by discouraging new construction in close proximity to the beach/dune system and encouraging those who have erected structures too close to the system to retreat from it

"(8) It is in the state's best interest to protect and to promote increased public access to South Carolina's beaches for out-of-state tourists and South Carolina residents alike " SC Code § 48-39-250 (Supp 1991)

South Carolina's shores is an extremely valuable public resource; that the erection of new construction, inter alia, contributes to the erosion and destruction of this public resource; and that discouraging new construction in close proximity to the beach/dune area is necessary to prevent a great public harm." Id., at 382-383, 404 SE2d, at 898. In the court's view, these concessions brought petitioner's challenge within a long line of this Court's cases sustaining against Due Process and Takings Clause challenges the State's use of its "police powers" to enjoin a property owner from activities akin to public nuisances. See Mugler v Kansas, 123 US 623, 31 L Ed 205, 8 S Ct 273 (1887) (law prohibiting manufacture of alcoholic beverages); Hadacheck v Sebastian, 239 US 394, 60 L Ed 348, 36 S Ct 143 (1915) (law barring operation of brick mill in residential area); Miller v Schoene, 276 US 272, 72 L Ed 568, 48 S Ct 246 (1928) (order to destroy diseased cedar trees to prevent infection of nearby orchards); Goldblatt v Hempstead, 369 US 590, 8 L Ed 2d 130, 82 S Ct 987 (1962) (law effectively preventing continued operation of quarry in residential area).

[1b] It is correct that many of our prior opinions have suggested that "harmful or noxious uses" of property may be proscribed by government regulation without the requirement of compensation. For a number of reasons, however, we think the South Carolina Supreme Court was too quick to conclude that that principle decides the present case. The "harmful or noxious uses" principle was the Court's early attempt to describe in theoretical terms why government may, consistent with the Takings Clause, affect property values by regulation without incurring an obligation to compensate—a reality we nowadays acknowledge explicitly with respect to the full scope of the State's police power. See, e.g., Penn Central Transportation Co., 438 US, at 125, 57 L Ed 2d 631, 98 S Ct 2646 (where State "reasonably conclude[s] that 'the health, safety, morals, or general welfare' would be promoted by prohibiting particular contemplated uses of land," compensation need not accompany prohibition); see also Nollan v California Coastal Commission, 483 US, at 834-835, 97 L Ed 2d 677, 107 S Ct 3141 ("Our cases have not elaborated on the standards for determining what constitutes a 'legitimate state interest[,]' [but] [t]hey have made clear . . . that a broad range of governmental purposes and regulations satisfy these requirements"). We made this very point in Penn Central Transportation Co., where, in the course of sustaining New York City's landmarks preservation program against a takings challenge, we rejected the petitioner's suggestion that Mugler and the cases following it were premised on, and thus limited by, some objective conception of "noxiousness":

> "[T]he uses in issue in Hadacheck, Miller, and Goldblatt were perfectly lawful in themselves. They involved no 'blameworthiness, . . . moral wrongdoing or conscious act of dangerous risk-taking which induce[d society] to shift the cost to a pa[rt]icular individual.' Sax, Takings and the Police Power, 74 Yale LJ 36, 50 (1964). These cases are better understood as resting not on any supposed 'noxious' quality of the prohibited uses but rather on the ground that the restrictions were reasonably related

> to the implementation of a policy —not unlike historic preservation —expected to produce a widespread public benefit and applicable to all similarly situated property." 438 US, at 133-134, n 30, 57 L Ed 2d 631, 98 S Ct 2646.

"Harmful or noxious use" analysis was, in other words, simply the progenitor of our more contemporary statements that "land-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' . . . ." Nollan, supra, at 834, 97 L Ed 2d 677, 107 S Ct 3141 (quoting Agins v Tiburon, 447 US, at 260, 65 L Ed 2d 106, 100 S Ct 2138); see also Penn Central Transportation Co., supra, at 127, 57 L Ed 2d 631, 98 S Ct 2646; Euclid v Ambler Realty Co., 272 US 365, 387-388, 71 L Ed 303, 47 S Ct 114, 54 ALR 1016 (1926).

[1c] The transition from our early focus on control of "noxious" uses to our contemporary understanding of the broad realm within which government may regulate without compensation was an easy one, since the distinction between "harm-preventing" and "benefit-conferring" regulation is often in the eye of the beholder. It is quite possible, for example, to describe in *either* fashion the ecological, economic, and aesthetic concerns that inspired the South Carolina legislature in the present case. One could say that imposing a servitude on Lucas's land is necessary in order to prevent his use of it from "harming" South Carolina's ecological resources; or, instead, in order to achieve the "benefits" of an ecological preserve.[11] Compare, e.g., Claridge v New Hampshire Wetlands Board, 125 NH 745, 752, 485 A2d 287, 292 (1984) (owner may, without compensation, be barred from filling wetlands because landfilling would deprive adjacent coastal habitats and marine fisheries of ecological support), with, e.g., Bartlett v Zoning Comm'n of Old Lyme, 161 Conn 24, 30, 282 A2d 907, 910 (1971) (owner barred from filling tidal marshland must be compensated, despite municipality's "laudable" goal of "preserv[ing] marshlands from encroachment or destruction"). Whether one or the other of the competing characterizations will

11. In the present case, in fact, some of the "[South Carolina] legislature's 'findings' " to which the South Carolina Supreme Court purported to defer in characterizing the purpose of the Act as "harm-preventing," 304 SC 376, 385, 404 SE2d 895, 900 (1991), seem to us phrased in "benefit-conferring" language instead. For example, they describe the importance of a construction ban in enhancing "South Carolina's annual tourism industry revenue," SC Code § 48-39-250(1)(b) (Supp 1991), in "provid[ing] habitat for numerous species of plants and animals, several of which are threatened or endangered," § 48-39-250(1)(c), and in "provid[ing] a natural healthy environment for the citizens of South Carolina to spend leisure time which serves their physical and mental well-being." § 48-39-250(1)(d). It would be pointless to make the outcome of this case hang upon this terminology, since the same interests could readily be described in "harm-preventing" fashion.

Justice Blackmun, however, apparently insists that we *must* make the outcome hinge (exclusively) upon the South Carolina Legislature's other, "harm-preventing" characterizations, focusing on the declaration that "prohibitions on building in front of the setback line are necessary to protect people and property from storms, high tides, and beach erosion." Post, at ——, 120 L Ed 2d, at 828. He says "[n]othing in the record undermines [this] assessment," ibid., apparently seeing no significance in the fact that the statute permits owners of *existing* structures to remain (and even to rebuild if their structures are not "destroyed beyond repair," SC Code Ann § 48-39-290(B)), and in the fact that the 1990 amendment authorizes the Council to issue permits for new construction in violation of the uniform prohibition, see SC Code § 48-39-290(D)(1) (Supp 1991).

come to one's lips in a particular case depends primarily upon one's evaluation of the worth of competing uses of real estate. See Restatement (Second) of Torts § 822, Comment g, p 112 (1979) ("[p]ractically all human activities unless carried on in a wilderness interfere to some extent with others or involve some risk of interference"). A given restraint will be seen as mitigating "harm" to the adjacent parcels or securing a "benefit" for them, depending upon the observer's evaluation of the relative importance of the use that the restraint favors. See Sax, Takings and the Police Power, 74 Yale LJ 36, 49 (1964) ("[T]he problem [in this area] is not one of noxiousness or harm-creating activity at all; rather it is a problem of inconsistency between perfectly innocent and independently desirable uses"). Whether Lucas's construction of single-family residences on his parcels should be described as bringing "harm" to South Carolina's adjacent ecological resources thus depends principally upon whether the describer believes that the State's use interest in nurturing those resources is so important that *any* competing adjacent use must yield.[12]

When it is understood that "prevention of harmful use" was merely our early formulation of the police power justification necessary to sustain (without compensation) *any* regulatory diminution in value; and that the distinction between regulation that "prevents harmful use" and that which "confers benefits" is difficult, if not impossible, to discern on an objective, value-free basis; it becomes self-evident that noxious-use logic cannot serve as a touchstone to distinguish regulatory "takings"—which require compensation—from regulatory deprivations that do not require compensation. A fortiori the legislature's recitation of a noxious-use justification cannot be the basis for departing from our categorical rule that total regulatory takings must be compensated. If it were, departure would virtually always be allowed. The South Carolina Supreme Court's approach would essentially nullify Mahon's affirmation of limits to the noncompensable exercise of the police power. Our cases provide no support for this: None of them that employed the logic of "harmful use" prevention to sustain a regulation involved an allegation that the regulation wholly eliminated the value of the claimant's land. See Keystone Bituminous Coal Assn., 480 US, at 513-514, 94 L Ed 2d 472, 107 S Ct 1232 (Rehnquist, C.J., dissenting).[13]

---

12. **[1d]** In Justice Blackmun's view, even with respect to regulations that deprive an owner of all developmental or economically beneficial land uses, the test for required compensation is whether the legislature has recited a harm-preventing justification for its action See post, at ——, ——-——, 120 L Ed 2d, at 828, 833-836. Since such a justification can be formulated in practically every case, this amounts to a test of whether the legislature has a stupid staff. We think the Takings Clause requires courts to do more than insist upon artful harm-preventing characterizations

13. E.g., Mugler v Kansas, 123 US 623, 31 L Ed 205, 8 S Ct 273 (1887) (prohibition upon use of a building as a brewery; other uses permitted); Plymouth Coal Co. v Pennsylvania, 232 US 531, 58 L Ed 713, 34 S Ct 359 (1914) (requirement that "pillar" of coal be left in ground to safeguard mine workers, mineral rights could otherwise be exploited); Reinman v Little Rock, 237 US 171, 59 L Ed 900, 35 S Ct 511 (1915) (declaration that livery stable constituted a public nuisance, other uses of the property permitted); Hadacheck v Sebastian, 239 US 394, 60 L Ed 348, 36 S Ct 143 (1915) (prohibition of brick manu-

[1e, 7a] Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner s estate shows that the proscribed use interests were not part of his title to begin with.[14] This accords, we think, with our "takings" jurisprudence, which has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the "bundle of rights" that they acquire when they obtain title to property. It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers; "[a]s long recognized, some values are enjoyed under an implied limitation and must yield to the police power." Pennsylvania Coal Co. v Mahon, 260 US, at 413, 67 L Ed 322, 43 S Ct 158. And in the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, he ought to be aware of the possibility that new regulation might even render his property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale), see Andrus v Allard, 444 US 51, 66-67, 62 L Ed 2d 210, 100 S Ct 318 (1979) (prohibition on sale of eagle feathers). In the case of land, however, we think the notion pressed by the Council that title is somehow held subject to the "implied limitation" that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture.[15]

---

facturing in residential area, other uses permitted) Goldblatt v Hempstead, 369 US 590, 8 L Ed 2d 130, 82 S Ct 987 (1962) (prohibition on excavation, other uses permitted)

14. Drawing on our First Amendment jurisprudence, see, e g , Employment Division, Department of Human Resources of Oregon v Smith, 494 US 872, 878-879, 108 L Ed 2d 876, 110 S Ct 1595 (1990), Justice Stevens would "loo[k] to the *generality* of a regulation of property" to determine whether compensation is owing Post, at —— 120 L Ed 2d, at 849 The Beachfront Management Act is general, in his view because it "regulates the use of the coastline of the entire state " Post, at —— 120 L Ed 2d, at 850 There may be some validity to the principle Justice Stevens proposes, but it does not properly apply to the present case The equivalent of a law of general application that inhibits the practice of religion without being aimed at religion, see Oregon v Smith, supra, is a law that destroys the value of land without being aimed at land Perhaps such a law—the generally applicable criminal prohibition on the manufacturing of alcoholic beverages challenged in Mugler comes to mind—cannot constitute a compensable taking See 123 US, at 655-656, 31 L Ed 205, 8 S Ct 273 But a regulation *specifically directed to land use* no more acquires immunity by plundering landowners generally than does a law specifically directed at religious practice acquire immunity by prohibiting all religions Justice Stevens' approach renders the Takings Clause little more than a particularized restatement of the Equal Protection Clause.

15. **[7b]** After accusing us of "launch[ing] a missile to kill a mouse," post, at ——, 120 L Ed 2d, at 825, Justice Blackmun expends a good deal of throw-weight of his own upon a noncombatant, arguing that our description of the "understanding" of land ownership that informs the Takings Clause is not supported by early American experience That is largely true, but entirely irrelevant The practices of the States *prior* to incorporation of the Takings and Just Compensation Clauses, see Chicago, B & Q R Co v Chicago, 166 US 226, 41 L Ed 979, 17 S Ct 581 (1897)—which, as Justice Blackmun acknowledges, occasionally included *outright physical appropriation* of land without compensation, see post, at ——, 120 L Ed 2d, at 839—were out of accord with

[1f, 8] Where "permanent physical occupation" of land is concerned, we have refused to allow the government to decree it anew (without compensation), no matter how weighty the asserted "public interests" involved. Loretto v Teleprompter Manhattan CATV Corp., 458 US, at 426, 73 L Ed 2d 868, 102 S Ct 3164—though we assuredly *would* permit the government to assert a permanent easement that was a preexisting limitation upon the landowner's title. Compare Scranton v Wheeler, 179 US 141, 163, 45 L Ed 126, 21 S Ct 48 (1900) (interests of "riparian owner in the submerged lands . . . bordering on a public navigable water" held subject to Government's navigational servitude), with Kaiser Aetna v United States, 444 US, at 178-180, 62 L Ed 2d 332, 100 S Ct 383 (imposition of navigational servitude on marina created and rendered navigable at private expense held to constitute a taking). We believe similar treatment must be accorded confiscatory regulations, i. e., regulations that prohibit all economically beneficial use of land: Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts—by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise.[18]

[1g, 9, 10a] On this analysis, the owner of a lake bed, for example, would not be entitled to compensation when he is denied the requisite permit to engage in a landfilling operation that would have the effect of flooding others' land. Nor the corporate owner of a nuclear generating plant, when it is directed to remove all improvements from its land upon discovery that the plant sits astride an earthquake fault. Such regulatory action may well have the effect of eliminating the land's only economically productive use, but it does not proscribe a productive use that was previously permissible under relevant property and nuisance principles. The use of these properties for what are now expressly prohibited purposes was *always* unlawful, and (subject to other constitutional limitations) it

---

any plausible interpretation of those provisions Justice Blackmun is correct that early constitutional theorists did not believe the Takings Clause embraced regulations of property at all, see post, at ——, 120 L Ed 2d, at 839, and n 23, but even he does not suggest (explicitly, at least) that we renounce the Court's contrary conclusion in Mahon Since the text of the Clause can be read to encompass regulatory as well as physical deprivations (in contrast to the text originally proposed by Madison, see Speech Proposing Bill of Rights (June 8, 1789), in 12 J. Madison, The Papers of James Madison 201 (C. Hobson, R. Rutland, W. Rachal & J. Sisson ed 1979) ("No person shall be . . . obliged to relinquish his property, where it may be necessary for public use, without a just compensation"), we decline to do so as well.

16. The principal "otherwise" that we have in mind is litigation absolving the State (or private parties) of liability for the destruction of "real and personal property, in cases of actual necessity, to prevent the spreading of a fire" or to forestall other grave threats to the lives and property of others. Bowditch v Boston, 101 US 16, 18-19, 25 L Ed 980 (1880); see United States v Pacific Railroad, 120 US 227, 238-239, 30 L Ed 634, 7 S Ct 490 (1887).

was open to the State at any point to make the implication of those background principles of nuisance and property law explicit. See Michelman, Property, Utility, and Fairness, Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv L Rev 1165, 1239-1241 (1967). In light of our traditional resort to "existing rules or understandings that stem from an independent source such as state law" to define the range of interests that qualify for protection as "property" under the Fifth (and Fourteenth) Amendments, Board of Regents of State Colleges v Roth, 408 US 564, 577, 33 L Ed 2d 548, 92 S Ct 2701 (1972); see, e.g., Ruckelshaus v Monsanto Co., 467 US 986, 1011-1012, 81 L Ed 2d 815, 104 S Ct 2862 (1984); Hughes v Washington, 389 US 290, 295, 19 L Ed 2d 530, 88 S Ct 438 (1967) (Stewart, J., concurring), this recognition that the Takings Clause does not require compensation when an owner is barred from putting land to a use that is proscribed by those "existing rules or understandings" is surely unexceptional. When, however, a regulation that declares "off-limits" all economically productive or beneficial uses of land goes beyond what the relevant background principles would dictate, compensation must be paid to sustain it.[17]

[11] The "total taking" inquiry we require today will ordinarily entail (as the application of state nuisance law ordinarily entails) analysis of, among other things, the degree of harm to public lands and resources, or adjacent private property, posed by the claimant's proposed activities, see, e.g., Restatement (Second) of Torts §§ 826, 827, the social value of the claimant's activities and their suitability to the locality in question, see, e.g., id., §§ 828(a) and (b), 831, and the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government (or adjacent private landowners) alike, see, e.g., id., §§ 827(e), 828(c), 830. The fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common-law prohibition (though changed circumstances or new knowledge may make what was previously permissible no longer so, see Restatement (Second) of Torts, supra, § 827, comment g). So also does the fact that other landowners, similarly situated, are permitted to continue the use denied to the claimant.

[1h, 12] It seems unlikely that common-law principles would have prevented the erection of any habitable or productive improvements on petitioner's land; they rarely support prohibition of the "essential use" of land. Curtin v Benson, 222 US 78, 86, 56 L Ed 102, 32 S Ct 31 (1911). The question, however, is one of state law to be dealt with on remand. We emphasize that to win its case South Carolina must do more than proffer the legislature's declaration that the uses Lucas desires are inconsistent with the public in-

17. [10b] Of course, the State may elect to rescind its regulation and thereby avoid having to pay compensation for a permanent deprivation. See First English Evangelical Lutheran Church, 482 US, at 321, 96 L Ed 2d 250, 107 S Ct 2378 But "where the [regulation has] already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." Ibid.

terest, or the conclusory assertion that they violate a common-law maxim such as sic utere tuo ut alienum non laedas. As we have said, a "State, by ipse dixit, may not transform private property into public property without compensation . . ." Webb's Fabulous Pharmacies, Inc. v Beckwith, 449 US 155, 164, 66 L Ed 2d 358, 101 S Ct 446 (1980). Instead, as it would be required to do if it sought to restrain Lucas in a common-law action for public nuisance, South Carolina must identify background principles of nuisance and property law that prohibit the uses he now intends in the circumstances in which the property is presently found. Only on this showing can the State fairly claim that, in proscribing all such beneficial uses, the Beachfront Management Act is taking nothing.[18]

* * *

The judgment is reversed and the cause remanded for proceedings not inconsistent with this opinion.

So ordered.

SEPARATE OPINIONS

Justice **Kennedy**, concurring in the judgment.

The case comes to the Court in an unusual posture, as all my colleagues observe. Ante, at ——, 120 L Ed 2d, at 810; post, at ——, 120 L Ed 2d, at 829 (Blackmun, J., dissenting); post, at ——, 120 L Ed 2d, at 842 (Stevens, J., dissenting); post, at ——— - ———, 120 L Ed 2d, at 851-852 (Statement of Souter, J.). After the suit was initiated but before it reached us, South Carolina amended its Beachfront Management Act to authorize the issuance of special permits at variance with the Act's general limitations. See SC Code § 48-39-290(D)(1) (Supp 1991). Petitioner has not applied for a special permit but may still do so. The availability of this alternative, if it can be invoked, may dispose of petitioner's claim of a permanent taking. As I read the Court's opinion, it does not decide the permanent taking claim, but neither does it foreclose the Supreme Court of South Carolina from considering the claim or requiring petitioner to pursue an administrative alternative not previously available.

The potential for future relief does not control our disposition, because whatever may occur in the future cannot undo what has occurred in the past. The Beachfront Management Act was enacted in 1988. SC Code § 48-39-250 et seq. (Supp 1990). It may have deprived petitioner of the use of his land in an interim period. § 48-39-290(A). If this deprivation amounts to a taking, its limited duration will not bar constitutional relief. It is well established that temporary takings are as protected by the Constitution as are

18. **[11]** Justice Blackmun decries our reliance on background nuisance principles at least in part because he believes those principles to be as manipulable as we find the "harm prevention" "benefit conferral" dichotomy, see post, at ——— - ——— 120 L Ed 2d, at 837-838. There is no doubt some leeway in a court's interpretation of what existing state law permits—but not remotely as much, we think, as in a legislative crafting of the reasons for its confiscatory regulation. We stress that an affirmative decree eliminating all economically beneficial uses may be defended only if an *objectively reasonable application* of relevant precedents would exclude those beneficial uses in the circumstances in which the land is presently found.

permanent ones. First English Evangelical Lutheran Church of Glendale v County of Los Angeles, 482 US 304, 318, 96 L Ed 2d 250, 107 S Ct 2378 (1987).

The issues presented in the case are ready for our decision. The Supreme Court of South Carolina decided the case on constitutional grounds, and its rulings are now before us. There exists no jurisdictional bar to our disposition, and prudential considerations ought not to militate against it. The State cannot complain of the manner in which the issues arose. Any uncertainty in this regard is attributable to the State, as a consequence of its amendment to the Beachfront Management Act. If the Takings Clause is to protect against temporary deprivations as well as permanent ones, its enforcement must not be frustrated by a shifting background of state law.

Although we establish a framework for remand, moreover, we do not decide the ultimate question of whether a temporary taking has occurred in this case. The facts necessary to the determination have not been developed in the record. Among the matters to be considered on remand must be whether petitioner had the intent and capacity to develop the property and failed to do so in the interim period because the State prevented him. Any failure by petitioner to comply with relevant administrative requirements will be part of that analysis.

The South Carolina Court of Common Pleas found that petitioner's real property has been rendered valueless by the State's regulation. App to Pet for Cert 37. The finding appears to presume that the property has no significant market value or resale potential. This is a curious finding, and I share the reservations of some of my colleagues about a finding that a beach front lot loses all value because of a development restriction. Post, at ——— - ———, 120 L Ed 2d, at 830-831 (Blackmun, J., dissenting); post, at ———, n 3, 120 L Ed 2d, at 844 (Stevens, J., dissenting); post, at ———, 120 L Ed 2d, at 851-852 (Statement of Souter, J.). While the Supreme Court of South Carolina on remand need not consider the case subject to this constraint, we must accept the finding as entered below. See Oklahoma City v Tuttle, 471 US 808, 816, 85 L Ed 2d 791, 105 S Ct 2427 (1985). Accepting the finding as entered, it follows that petitioner is entitled to invoke the line of cases discussing regulations that deprive real property of all economic value. See Agins v Tiburon, 447 US 255, 260, 65 L Ed 2d 106, 100 S Ct 2138 (1980).

The finding of no value must be considered under the Takings Clause by reference to the owner's reasonable, investment-backed expectations. Kaiser Aetna v United States, 444 US 164, 175, 62 L Ed 2d 332, 100 S Ct 383 (1979); Penn Central Transportation Co. v New York City, 438 US 104, 124, 57 L Ed 2d 631, 98 S Ct 2646 (1978); see also W. B. Worthen Co. v Kavanaugh, 295 US 56, 79 L Ed 1298, 55 S Ct 555, 97 ALR 905 (1935). The Takings Clause, while conferring substantial protection on property owners, does not eliminate the police power of the State to enact limitations on the use of their property. Mugler v Kansas, 123 US 623, 669, 31 L Ed 205, 8 S Ct 273 (1887). The rights conferred by the Takings Clause and the police power of the State may coexist without

conflict. Property is bought and sold, investments are made, subject to the State's power to regulate. Where a taking is alleged from regulations which deprive the property of all value, the test must be whether the deprivation is contrary to reasonable, investment-backed expectations.

There is an inherent tendency towards circularity in this synthesis, of course: for if the owner's reasonable expectations are shaped by what courts allow as a proper exercise of governmental authority, property tends to become what courts say it is. Some circularity must be tolerated in these matters, however, as it is in other spheres. E g, Katz v United States, 389 US 347, 19 L Ed 2d 576, 88 S Ct 507 (1967) (Fourth Amendment protections defined by reasonable expectations of privacy). The definition moreover, is not circular in its entirety The expectations protected by the Constitution are based on objective rules and customs that can be understood as reasonable by all parties involved.

In my view, reasonable expectations must be understood in light of the whole of our legal tradition The common law of nuisance is too narrow a confine for the exercise of regulatory power in a complex and interdependent society Goldblatt v Hempstead, 369 US 590, 593, 8 L Ed 2d 130, 82 S Ct 987 (1962) The State should not be prevented from enacting new regulatory initiatives in response to changing conditions, and courts must consider all reasonable expectations whatever their source. The Takings Clause does not require a static body of state property law, it protects private expectations to ensure private investment I agree with the Court that nuisance prevention accords with the most common expectations of property owners who face regulation, but I do not believe this can be the sole source of state authority to impose severe restrictions. Coastal property may present such unique concerns for a fragile land system that the State can go further in regulating its development and use than the common law of nuisance might otherwise permit.

The Supreme Court of South Carolina erred, in my view, by reciting the general purposes for which the state regulations were enacted without a determination that they were in accord with the owner's reasonable expectations and therefore sufficient to support a severe restriction on specific parcels of property. See 304 SC 376, 383, 404 SE2d 895, 899 (1991) The promotion of tourism, for instance, ought not to suffice to deprive specific property of all value without a corresponding duty to compensate Furthermore, the means as well as the ends of regulation must accord with the owner's reasonable expectations. Here, the State did not act until after the property had been zoned for individual lot development and most other parcels had been improved, throwing the whole burden of the regulation on the remaining lots. This too must be measured in the balance. See Pennsylvania Coal Co. v Mahon, 260 US 393, 416, 67 L Ed 322, 43 S Ct 158 (1922).

With these observations, I concur in the judgment of the Court.

Justice **Blackmun**, dissenting

Today the Court launches a missile to kill a mouse

The State of South Carolina prohibited petitioner Lucas from building a permanent structure on his property from 1988 to 1990. Relying on an unreviewed (and implausible) state trial court finding that this restriction left Lucas' property valueless, this Court granted review to determine whether compensation must be paid in cases where the State prohibits all economic use of real estate. According to the Court, such an occasion never has arisen in any of our prior cases, and the Court imagines that it will arise "relatively rarely" or only in "extraordinary circumstances." Almost certainly it did not happen in this case.

Nonetheless, the Court presses on to decide the issue, and as it does, it ignores its jurisdictional limits, remakes its traditional rules of review, and creates simultaneously a new categorical rule and an exception (neither of which is rooted in our prior case law, common law, or common sense). I protest not only the Court's decision, but each step taken to reach it. More fundamentally, I question the Court's wisdom in issuing sweeping new rules to decide such a narrow case. Surely, as Justice Kennedy demonstrates, the Court could have reached the result it wanted without inflicting this damage upon our Taking Clause jurisprudence.

My fear is that the Court's new policies will spread beyond the narrow confines of the present case. For that reason, I, like the Court, will give far greater attention to this case than its narrow scope suggests —not because I can intercept the Court's missile, or save the targeted mouse, but because I hope perhaps to limit the collateral damage.

I

A

In 1972 Congress passed the Coastal Zone Management Act. 16 USC § 1451 et seq. [16 USCS §§ 1451 et seq.]. The Act was designed to provide States with money and incentives to carry out Congress' goal of protecting the public from shoreline erosion and coastal hazards. In the 1980 Amendments to the Act, Congress directed States to enhance their coastal programs by "[p]reventing or significantly reducing threats to life and the destruction of property by eliminating development and redevelopment in high-hazard areas."[1] 16 USC § 1456b(a)(2) (1988 ed, Supp II) [16 USCS § 1456b(a)(2)].

South Carolina began implementing the congressional directive by enacting the South Carolina Coastal Zone Management Act of 1977. Under the 1977 Act, any construction activity in what was designated the "critical area" required a permit from the Council, and the construction of any habitable structure was

1. The country has come to recognize that uncontrolled beachfront development can cause serious damage to life and property. See Brief for Sierra Club, et al. as Amici Curiae 2-5. Hurricane Hugo's September 1989 attack upon South Carolina's coastline, for example, caused 29 deaths and approximately $6 billion in property damage, much of it the result of uncontrolled beachfront development. See Zalkin, Shifting Sands and Shifting Doctrines: The Supreme Court's Changing Takings Doctrine and South Carolina's Coastal Zone Statute, 79 Cal L Rev 205, 212-213 (1991). The beachfront buildings are not only themselves destroyed in such a storm, "but they are often driven, like battering rams, into adjacent inland homes." Ibid. Moreover, the development often destroys the natural sand dune barriers that provide storm breaks. Ibid.

prohibited. The 1977 critical area was relatively narrow.

This effort did not stop the loss of shoreline. In October 1986, the Council appointed a "Blue Ribbon Committee on Beachfront Management" to investigate beach erosion and propose possible solutions. In March 1987, the Committee found that South Carolina's beaches were "critically eroding," and proposed land-use restrictions. Report of the South Carolina Blue Ribbon Committee on Beachfront Management i, 6-10 (March 1987). In response, South Carolina enacted the Beachfront Management Act on July 1, 1988. SC Code § 48-39-250 et seq. (Supp 1990). The 1988 Act did not change the uses permitted within the designated critical areas. Rather, it enlarged those areas to encompass the distance from the mean high watermark to a setback line established on the basis of "the best scientific and historical data" available.[2] SC Code § 48-39-280 (Supp 1991).

B

Petitioner Lucas is a contractor, manager, and part owner of the Wild Dune development on the Isle of Palms. He has lived there since 1978. In December 1986, he purchased two of the last four pieces of vacant property in the development.[3] The area is notoriously unstable. In roughly half of the last 40 years, all or part of petitioner's property was part of the beach or flooded twice daily by the ebb and flow of the tide. Tr 84. Between 1957 and 1963, petitioner's property was under water. Id., at 79, 81-82. Between 1963 and 1973 the shoreline was 100 to 150 feet onto petitioner's property. Ibid. In 1973 the first line of stable vegetation was about halfway through the property. Id., at 80. Between 1981 and 1983, the Isle of Palms issued 12 emergency orders for sandbagging to protect property in the Wild Dune development. Id., at 99. Determining that local habitable structures were in imminent danger of collapse, the Council issued permits for two rock revetments to protect condominium developments near petitioner's property from erosion; one of the revetments extends more than halfway onto one of his lots. Id., at 102.

C

The South Carolina Supreme Court found that the Beach Management Act did not take petitioner's property without compensation. The decision rested on two premises that until today were unassailable—that the State has the power to prevent any use of property it finds to be harmful to its citizens, and that a state statute is entitled to a presumption of constitutionality.

The Beachfront Management Act includes a finding by the South Carolina General Assembly that the beach/dune system serves the pur-

2. The setback line was determined by calculating the distance landward from the crest of an ideal oceanfront sand dune which is forty times the annual erosion rate. SC Code § 48-39-280 (Supp 1991).

3. The properties were sold frequently at rapidly escalating prices before Lucas purchased them. Lot 22 was first sold in 1979 for $96,660, sold in 1984 for $187,500, then in 1985 for $260,000, and, finally, to Lucas in 1986 for $475,000. He estimated its worth in 1991 at $650,000. Lot 24 had a similar past. The record does not indicate who purchased the properties prior to Lucas, or why none of the purchasers held on to the lots and built on them. Tr 44-46.

pose of "protect[ing] life and property by serving as a storm barrier which dissipates wave energy and contributes to shoreline stability in an economical and effective manner." § 48-39-250(1)(a). The General Assembly also found that "development unwisely has been sited too close to the [beach/dune] system. This type of development has jeopardized the stability of the beach/dune system, accelerated erosion, and endangered adjacent property." § 48-39-250(4); see also § 48-39-250(6) (discussing the need to "afford the beach/dune system space to accrete and erode").

If the state legislature is correct that the prohibition on building in front of the setback line prevents serious harm, then, under this Court's prior cases, the Act is constitutional. "Long ago it was recognized that all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community, and the Takings Clause did not transform that principle to one that requires compensation whenever the State asserts its power to enforce it." Keystone Bituminous Coal Assn. v DeBenedictis, 480 US 470, 491-492, 94 L Ed 2d 472, 107 S Ct 1232 (1987) (internal quotations omitted); see also id., at 488-489, and n 18, 94 L Ed 2d 472, 107 S Ct 1232. The Court consistently has upheld regulations imposed to arrest a significant threat to the common welfare, whatever their economic effect on the owner. See e.g., Goldblatt v Hempstead, 369 US 590, 592-593, 8 L Ed 2d 130, 82 S Ct 987 (1962); Euclid v Ambler Realty Co., 272 US 365, 71 L Ed 303, 47 S Ct 114, 54 ALR 1016 (1926); Gorieb v Fox, 274 US 603, 608, 71 L Ed 1228, 47 S Ct 675, 53 ALR 1210 (1927); Mugler v Kansas, 123 US 623, 31 L Ed 205, 8 S Ct 273 (1887).

Petitioner never challenged the legislature's findings that a building ban was necessary to protect property and life. Nor did he contend that the threatened harm was not sufficiently serious to make building a house in a particular location a "harmful" use, that the legislature had not made sufficient findings, or that the legislature was motivated by anything other than a desire to minimize damage to coastal areas. Indeed, petitioner objected at trial that evidence as to the purposes of the setback requirement was irrelevant. Tr 68. The South Carolina Supreme Court accordingly understood petitioner not to contest the State's position that "discouraging new construction in close proximity to the beach/dune area is necessary to prevent a great public harm," 304 SC 376, ——, 404 SE2d 895, 898 (1991), and "to prevent serious injury to the community." Id., at ——, 404 SE2d, at 901. The court considered itself "bound by these uncontested legislative findings . . . [in the absence of] any attack whatsoever on the statutory scheme." Id., at ——, 404 SE2d, at 898.

Nothing in the record undermines the General Assembly's assessment that prohibitions on building in front of the setback line are necessary to protect people and property from storms, high tides, and beach erosion. Because that legislative determination cannot be disregarded in the absence of such evidence, see, e.g., Euclid, 272 US, at 388, 71 L Ed 303, 47 S Ct 114, 54 ALR 1016; O'Gorman & Young v Hartford Fire Ins. Co, 282 US 251, 257-258, 75 L Ed 324, 51 S Ct 130, 72 ALR 1163

(1931) (Brandeis, J.), and because its determination of harm to life and property from building is sufficient to prohibit that use under this Court's cases, the South Carolina Supreme Court correctly found no taking.

II

My disagreement with the Court begins with its decision to review this case. This Court has held consistently that a land-use challenge is not ripe for review until there is a final decision about what uses of the property will be permitted. The ripeness requirement is not simply a gesture of good-will to land-use planners. In the absence of "a final and authoritative determination of the type and intensity of development legally permitted on the subject property," MacDonald, Sommer & Frates v Yolo County, 477 US 340, 348, 91 L Ed 2d 285, 106 S Ct 2561 (1986), and the utilization of state procedures for just compensation, there is no final judgment, and in the absence of a final judgment there is no jurisdiction. See San Diego Gas & Electric Co. v San Diego, 450 US 621, 633, 67 L Ed 2d 551, 101 S Ct 1287 (1981); Agins v Tiburon, 447 US 255, 260, 65 L Ed 2d 106, 100 S Ct 2138 (1980).

This rule is "compelled by the very nature of the inquiry required by the Just Compensation Clause," because the factors applied in deciding a takings claim "simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question." Williamson County Regional Planning Comm'n v Hamilton Bank of Johnson City, 473 US 172, 190, 191, 87 L Ed 2d 126, 105 S Ct 3108 (1985). See also MacDonald, Sommer & Frates, 477 US, at 348, 91 L Ed 2d 285, 106 S Ct 2561 ("A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes") (citation omitted).

The Court admits that the 1990 amendments to the Beachfront Management Act allowing special permits preclude Lucas from asserting that his property has been permanently taken. See ante, at ——, ——, 120 L Ed 2d, at 810. The Court agrees that such a claim would not be ripe because there has been no final decision by respondent on what uses will be permitted. The Court, however, will not be denied: it determines that petitioner's "temporary takings" claim for the period from July 1, 1988, to June 25, 1990, is ripe. But this claim also is not justiciable.[4]

From the very beginning of this litigation, respondent has argued that the courts:

> "lac[k] jurisdiction in this matter because the Plaintiff has sought no authorization from Council for use of his property, has not challenged the location of the baseline or set-

4. The Court's reliance, ante, at ——, 120 L Ed 2d, at 811, on Esposito v South Carolina Coastal Council, 939 F2d 165, 168 (CA4 1991) cert pending, No 91-941, in support of its decision to consider Lucas temporary taking claim ripe is misplaced. In Esposito the plaintiffs brought a facial challenge to the mere enactment of the Act. Here, of course, Lucas has brought an asapplied challenge. See Brief for Petitioner 16. Facial challenges are ripe when the Act is passed; applied challenges require a final decision on the Act's application to the property in question.

> back line as alleged in the Complaint and because no final agency decision has been rendered concerning use of his property or location of said baseline or setback line."

Tr 10 (answer, as amended). Although the Council's plea has been ignored by every court, it is undoubtedly correct.

Under the Beachfront Management Act, petitioner was entitled to challenge the setback line or the baseline or erosion rate applied to his property in formal administrative, followed by judicial, proceedings. SC Code § 48-39-280(E) (Supp 1991). Because Lucas failed to pursue this administrative remedy, the Council never finally decided whether Lucas' particular piece of property was correctly categorized as a critical area in which building would not be permitted. This is all the more crucial because Lucas argued strenuously in the trial court that his land was perfectly safe to build on, and that his company had studies to prove it. Tr 20, 25, 36. If he was correct, the Council's final decision would have been to alter the setback line, eliminating the construction ban on Lucas' property. That petitioner's property fell within the critical area as initially interpreted by the Council does not excuse petitioner's failure to challenge the Act's application to his property in the administrative process. The claim is not ripe until petitioner seeks a variance from that status. "[W]e have made it quite clear that the mere assertion of regulatory jurisdiction by a governmental body does not constitute a regulatory taking." United States v Riverside Bayview Homes, Inc., 474 US 121, 126, 88 L Ed 2d 419, 106 S Ct 455 (1985). See also Williamson County, 473 US, at 188, 87 L Ed 2d 126, 105 S Ct 3108 (claim not ripe because respondent did not seek variances that would have allowed it to develop the property, notwithstanding the Commission's finding that the plan did not comply with the zoning ordinance and subdivision regulations).[5]

Even if I agreed with the Court that there were no jurisdictional barriers to deciding this case, I still would not try to decide it. The Court creates its new taking jurisprudence based on the trial court's finding that the property had lost all eco-

5. Even more baffling, given its decision, just a few days ago, in Lujan v Defenders of Wildlife, 504 US ——, 119 L Ed 2d 351, 112 S Ct 2130 (1992), the Court decides petitioner has demonstrated injury in fact. In his complaint, petitioner made no allegations that he had any definite plans for using his property. App to Pet for Cert 153-156. At trial, Lucas testified that he had house plans drawn up, but that he was "in no hurry" to build "because the lot was appreciating in value." Tr 28-29. The trial court made no findings of fact that Lucas had any plans to use the property from 1988 to 1990. "'[S]ome day' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require." 504 US, at ——, , 119 L Ed 2d 351, 112 S Ct 2130. The Court circumvents Defenders of Wildlife by deciding to resolve this case as if it arrived on the pleadings alone. But it did not. Lucas had a full trial on his claim for "damages for the temporary taking of his property from the date of the 1988 Act's passage to such time as this matter is finally resolved," ante, at ——, n 3, 120 L Ed 2d, at 811, quoting the Complaint, and failed to demonstrate any immediate concrete plans to build or sell.

nomic value.[6] This finding is almost certainly erroneous. Petitioner still can enjoy other attributes of ownership, such as the right to exclude others, "one of the most essential sticks in the bundle of rights that are commonly characterized as property." Kaiser Aetna v United States, 444 US 164, 176, 62 L Ed 2d 332, 100 S Ct 383 (1979). Petitioner can picnic, swim, camp in a tent, or live on the property in a movable trailer. State courts frequently have recognized that land has economic value where the only residual economic uses are recreation or camping. See, e.g., Turnpike Realty Co. v Dedham, 362 Mass 221, 284 NE2d 891 (1972); Turner v County of Del Norte, 24 Cal App 3d 311, 101 Cal Rptr 93 (1972), cert denied, 409 US 1108, 34 L Ed 2d 689, 93 S Ct 908 (1973); Hall v Board of Environmental Protection, 528 A2d 453 (Me 1987). Petitioner also retains the right to alienate the land, which would have value for neighbors and for those prepared to enjoy proximity to the ocean without a house.

Yet the trial court, apparently believing that "less value" and "valueless" could be used interchangeably, found the property "valueless." The court accepted no evidence from the State on the property's value without a home, and petitioner's appraiser testified that he never had considered what the value would be absent a residence. Tr 54-55. The appraiser's value was based on the fact that the "highest and best use of these lots . . . [is] luxury single family detached dwellings." Id., at 48. The trial court appeared to believe that the property could be considered "valueless" if it was not available for its most profitable use. Absent that erroneous assumption, see Goldblatt, 369 US, at 592, 8 L Ed 2d 130, 82 S Ct 987, I find no evidence in the record supporting the trial court's conclusion that the damage to the lots by virtue of the restrictions was "total." Record 128 (findings of fact). I agree with the Court, ante, at ——, n 9, 120 L Ed 2d, at 816, that it has the power to decide a case that turns on an erroneous finding, but I question the wisdom of deciding an issue based on a factual premise that does not exist in this case, and in the judgment of the Court will exist in the future only in "extraordinary circumstance[s]." Ante, at ——, 120 L Ed 2d, at 814.

Clearly, the Court was eager to decide this case.[7] But eagerness, in

6. Respondent contested the findings of fact of the trial court in the South Carolina Supreme Court, but that court did not resolve the issue. This Court's decision to assume for its purposes that petitioner had been denied all economic use of his land does not, of course, dispose of the issue on remand.

7. The Court overlooks the lack of a ripe and justiciable claim apparently out of concern that in the absence of its intervention Lucas will be unable to obtain further adjudication of his temporary-taking claim. The Court chastises respondent for arguing that Lucas's temporary-taking claim is premature because it failed "so much as [to] comment[]" upon the effect of the South Carolina Supreme Court's decision on petitioner's ability to obtain relief for the 2-year period, and it frets that Lucas would "be unable (absent our intervention now) to obtain further state-court adjudication with respect to the 1988-1990 period." Ante, at ——, 120 L Ed 2d, at 810. Whatever the explanation for the Court's intense interest in Lucas' plight when ordinarily we are more cautious in granting discretionary review, the concern would have been more prudently expressed by vacating the judgment below and remanding for further consideration in light of the 1990 amendments. At that point, petitioner could have brought a temporary-taking claim in the state courts

the absence of proper jurisdiction, must—and in this case should have been—met with restraint.

III

The Court's willingness to dispense with precedent in its haste to reach a result is not limited to its initial jurisdictional decision. The Court also alters the long-settled rules of review.

The South Carolina Supreme Court's decision to defer to legislative judgments in the absence of a challenge from petitioner comports with one of this Court's oldest maxims: "the existence of facts supporting the legislative judgment is to be presumed." United States v Carolene Products Co., 304 US 144, 152, 82 L Ed 1234, 58 S Ct 778 (1938). Indeed, we have said the legislature's judgment is "well-nigh conclusive." Berman v Parker, 348 US 26, 32, 99 L Ed 27, 75 S Ct 98 (1954). See also Sweet v Rechel, 159 US 380, 392, 40 L Ed 188, 16 S Ct 43 (1895); Euclid, 272 US, at 388, 71 L Ed 303, 47 S Ct 114, 54 ALR 1016 ("If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control").

Accordingly, this Court always has required plaintiffs challenging the constitutionality of an ordinance to provide "some factual foundation of record" that contravenes the legislative findings. O'Gorman & Young, 282 US, at 258, 75 L Ed 324, 51 S Ct 130, 72 ALR 1163. In the absence of such proof, "the presumption of constitutionality must prevail." Id., at 257, 75 L Ed 324, 51 S Ct 130, 72 ALR 1163. We only recently have reaffirmed that claimants have the burden of showing a state law constitutes a taking. See Keystone Bituminous Coal, 480 US, at 485, 94 L Ed 2d 472, 107 S Ct 1232. See also Goldblatt, 369 US, at 594, 8 L Ed 2d 130, 82 S Ct 987 (citing "the usual presumption of constitutionality" that applies to statutes attacked as takings).

Rather than invoking these traditional rules, the Court decides the State has the burden to convince the courts that its legislative judgments are correct. Despite Lucas' complete failure to contest the legislature's findings of serious harm to life and property if a permanent structure is built, the Court decides that the legislative findings are not sufficient to justify the use prohibition. Instead, the Court "emphasize[s]" the State must do more than merely proffer its legislative judgments to avoid invalidating its law. Ante, at ——, 120 L Ed 2d, at 822. In this case, apparently, the State now has the burden of showing the regulation is not a taking. The Court offers no justification for its sudden hostility toward state legislators, and I doubt that it could.

IV

The Court does not reject the South Carolina Supreme Court's decision simply on the basis of its disbelief and distrust of the legislature's findings. It also takes the opportunity to create a new scheme for regulations that eliminate all economic value. From now on, there is a categorical rule finding these regulations to be a taking unless the use they prohibit is a background common-law nuisance or property principle. See ante, at ——-——, 120 L Ed 2d, at 821-823.

A

I first question the Court's rationale in creating a category that obviates a "case-specific inquiry into the public interest advanced," ante, at ——, 120 L Ed 2d, at 812, if all economic value has been lost. If one fact about the Court's taking jurisprudence can be stated without contradiction, it is that "the particular circumstances of each case" determine whether a specific restriction will be rendered invalid by the government's failure to pay compensation. United States v Central Eureka Mining Co., 357 US 155, 168, 2 L Ed 2d 1228, 78 S Ct 1097 (1958). This is so because although we have articulated certain factors to be considered, including the economic impact on the property owner, the ultimate conclusion "necessarily requires a weighing of private and public interests." Agins, 447 US, at 261, 65 L Ed 2d 106, 100 S Ct 2138. When the government regulation prevents the owner from any economically valuable use of his property, the private interest is unquestionably substantial, but we have never before held that no public interest can outweigh it. Instead the Court's prior decisions "uniformly reject the proposition that diminution in property value, standing alone, can establish a 'taking.'" Penn Central Transp. Co. v New York City, 438 US 104, 131, 57 L Ed 2d 631, 98 S Ct 2646 (1978).

This Court repeatedly has recognized the ability of government, in certain circumstances, to regulate property without compensation no matter how adverse the financial effect on the owner may be. More than a century ago, the Court explicitly upheld the right of States to prohibit uses of property injurious to public health, safety, or welfare without paying compensation. "A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property." Mugler v Kansas, 123 US 623, 668-669, 31 L Ed 205, 8 S Ct 273 (1887). On this basis, the Court upheld an ordinance effectively prohibiting operation of a previously lawful brewery, although the "establishments will become of no value as property." Id., at 664, 31 L Ed 205, 8 S Ct 273; see also id., at 668, 31 L Ed 205, 8 S Ct 273.

Mugler was only the beginning in a long line of cases.[8] In Powell v Pennsylvania, 127 US 678, 32 L Ed 253, 8 S Ct 992 (1888), the Court upheld legislation prohibiting the manufacture of oleomargarine, despite the owner's allegation that "if prevented from continuing it, the value of his property employed therein would be entirely lost and he be deprived of the means of livelihood." Id., at 682, 32 L Ed 253, 8 S Ct 992. In Hadacheck v Sebastian, 239 US 394, 60 L Ed 348, 36 S Ct 143 (1915), the Court upheld an ordinance prohibiting a brickyard, although the owner had made excavations on the land that prevented it

8. Prior to Mugler, the Court had held that owners whose real property is wholly destroyed to prevent the spread of a fire are not entitled to compensation. Bowditch v Boston, 101 US 16, 18-19, 25 L Ed 980 (1879). And the Court recognized in The License Cases, 5 How 504, 589, 12 L Ed 256 (1847) (opinion of McLean, J.), that "[t]he acknowledged police power of a State extends often to the destruction of property."

from being utilized for any purpose but a brickyard. Id., at 405, 60 L Ed 348, 36 S Ct 143. In Miller v Schoene, 276 US 272, 72 L Ed 568, 48 S Ct 246 (1928), the Court held that the Fifth Amendment did not require Virginia to pay compensation to the owner of cedar trees ordered destroyed to prevent a disease from spreading to nearby apple orchards. The "preferment of [the public interest] over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property." Id., at 280, 72 L Ed 568, 48 S Ct 246. Again, in Omnia Commercial Co. v United States, 261 US 502, 67 L Ed 773, 43 S Ct 437 (1923), the Court stated that "destruction of, or injury to, property is frequently accomplished without a 'taking' in the constitutional sense." Id., at 508, 67 L Ed 773, 43 S Ct 437.

More recently, in Goldblatt, the Court upheld a town regulation that barred continued operation of an existing sand and gravel operation in order to protect public safety. 369 US, at 596, 8 L Ed 2d 130, 82 S Ct 987. "Although a comparison of values before and after is relevant," the Court stated, "it is by no means conclusive."[9] Id., at 594, 8 L Ed 2d 130, 82 S Ct 987. In 1978, the Court declared that "in instances in which a state tribunal reasonably concluded that 'the health, safety, morals, or general welfare' would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land-use regulation that destroyed . . . recognized real property interests." Penn Central Transp. Co., 438 US, at 125, 57 L Ed 2d 631, 98 S Ct 2646. In First Lutheran Church v Los Angeles County, 482 US 304, 96 L Ed 2d 250, 107 S Ct 2378 (1987), the owner alleged that a floodplain ordinance had deprived it of "all use" of the property. Id., at 312, 96 L Ed 2d 250, 107 S Ct 2378. The Court remanded the case for consideration whether, even if the ordinance denied the owner all use, it could be justified as a safety measure.[10] Id., at 313, 96 L Ed 2d 250, 107 S Ct 2378. And in Keystone Bituminous Coal, the Court summarized over 100 years of precedent: "the Court has repeatedly upheld regulations that destroy or adversely affect real property interests."[11] 480 US, at 489, n 18, 94 L Ed 2d 472, 107 S Ct 1232.

---

9. That same year, an appeal came to the Court asking "[w]hether zoning ordinances which altogether destroy the worth of valuable land by prohibiting the only economic use of which it is capable effect a taking of real property without compensation." Juris Statement, OT 1962, No. 307, p 5. The Court dismissed the appeal for lack of a substantial federal question. Consolidated Rock Products Co. v Los Angeles, 57 Cal 2d 515, 370 P2d 342, appeal dism'd, 371 US 36, 9 L Ed 2d 112, 83 S Ct 145 (1962).

10. On remand, the California court found no taking in part because the zoning regulation "involves this highest of public interests —the prevention of death and injury." First Lutheran Church v Los Angeles, 210 Cal App 3d 1353, 1370, 258 Cal Rptr 893, —— (1989), cert denied, 493 US 1056, 107 L Ed 2d 950, 110 S Ct 866 (1990).

11. The Court's suggestion that Agins v Tiburon, 447 US 255, 65 L Ed 2d 106, 100 S Ct 2138 (1980), a unanimous opinion, created a new per se rule, only now discovered, is unpersuasive. In Agins, the Court stated that "no precise rule determines when property has been taken" but instead that "the question necessarily requires a weighing of public and private interest." Id., at 260-262, 65 L Ed 2d 106, 100 S Ct 2138. The other cases cited by the Court, ante, at ——, 120 L Ed 2d, at 812, repeat the Agins sentence, but in no way

The Court recognizes that "our prior opinions have suggested that 'harmful or noxious uses' of property may be proscribed by government regulation without the requirement of compensation," ante, at ——, 120 L Ed 2d, at 817, but seeks to reconcile them with its categorical rule by claiming that the Court never has upheld a regulation when the owner alleged the loss of all economic value. Even if the Court's factual premise were correct, its understanding of the Court's cases is distorted. In none of the cases did the Court suggest that the right of a State to prohibit certain activities without paying compensation turned on the availability of some residual valuable use.[12] Instead, the cases depended on whether the government interest was sufficient to prohibit the activity, given the significant private cost.[13]

These cases rest on the principle that the State has full power to prohibit an owner's use of property if it is harmful to the public. "[S]ince no individual has a right to use his property so as to create a nuisance or otherwise harm others, the State has not 'taken' anything when it asserts its power to enjoin the nui-

---

suggest that the public interest is irrelevant if total value has been taken. The Court has indicated that proof that a regulation does *not* deny an owner economic use of his property is sufficient to defeat a facial taking challenge. See Hodel v Virginia Surface Mining & Reclamation Assn., Inc., 452 US 264, 295-297, 69 L Ed 2d 1, 101 S Ct 2352 (1981). But the conclusion that a regulation is not on its face a taking because it allows the landowner some economic use of property is a far cry from the proposition that *denial* of such use is sufficient to establish a taking claim regardless of any other consideration. The Court never has accepted the latter proposition.

The Court relies today on dicta in Agins, Hodel, Nollan v California Coastal Comm'n, 483 US 825, 97 L Ed 2d 677, 107 S Ct 3141 (1987), and Keystone Bituminous Coal v DeBenedictis, 480 US 470, 94 L Ed 2d 472, 107 S Ct 1232 (1987), for its new categorical rule. Ante, at ——, 120 L Ed 2d, at 813. I prefer to rely on the directly contrary holdings in cases such as Mugler and Hadacheck, not to mention contrary statements in the very cases on which the Court relies. See Agins, 447 US, at 260-262, 65 L Ed 2d 106, 100 S Ct 2138; Keystone Bituminous Coal, 480 US, at 489 n 18, 491-492, 94 L Ed 2d 472, 107 S Ct 1232.

12. Miller v Schoene, 276 US 272, 72 L Ed 568, 48 S Ct 246 (1928), is an example. In the course of demonstrating that apple trees are more valuable than red cedar trees, the Court noted that red cedar has "occasional use and value as lumber." Id., at 279, 72 L Ed 568, 48 S Ct 246. But the Court did not discuss whether the timber owned by the petitioner in that case was commercially saleable, and nothing in the opinion suggests that the State's right to require uncompensated felling of the trees depended on any such salvage value. To the contrary, it is clear from its unanimous opinion that the Schoene Court would have sustained a law requiring the burning of cedar trees if that had been necessary to protect apple trees in which there was a public interest: the Court spoke of preferment of the public interest over the property interest of the individual, "to the extent even of its destruction." Id., at 280, 72 L Ed 568, 48 S Ct 246.

13. The Court seeks to disavow the holdings and reasoning of Mugler and subsequent cases by explaining that they were the Court's early efforts to define the scope of the police power. There is language in the earliest taking cases suggesting that the police power was considered to be the power simply to prevent harms. Subsequently, the Court expanded its understanding of what were government's legitimate interests. But it does not follow that the holding of those early cases—that harmful and noxious uses of property can be forbidden whatever the harm to the property owner and without the payment of compensation—was repudiated. To the contrary, as the Court consciously expanded the scope of the police power beyond preventing harm, it clarified that there was a core of public interests that overrode any private interest. See Keystone Bituminous Coal, 480 US, at 491, n 20, 94 L Ed 2d 472, 107 S Ct 1232.

sance-like activity." Keystone Bituminous Coal, 480 US, at 491, n 20, 94 L Ed 2d 472, 107 S Ct 1232. It would make no sense under this theory to suggest that an owner has a constitutionally protected right to harm others, if only he makes the proper showing of economic loss.[14] See Pennsylvania Coal Co. v Mahon, 260 US 393, 418, 67 L Ed 322, 43 S Ct 158, 28 ALR 1321 (1922) (Brandeis, J., dissenting) ("Restriction upon [harmful] use does not become inappropriate as a means, merely because it deprives the owner of the only use to which the property can then be profitably put").

B

Ultimately even the Court cannot embrace the full implications of its per se rule: it eventually agrees that there cannot be a categorical rule for a taking based on economic value that wholly disregards the public need asserted. Instead, the Court decides that it will permit a State to regulate all economic value only if the State prohibits uses that would not be permitted under "background principles of nuisance and property law."[15] Ante, at ——, 120 L Ed 2d, at 823.

Until today, the Court explicitly had rejected the contention that the government's power to act without paying compensation turns on whether the prohibited activity is a common-law nuisance.[16] The brewery closed in Mugler itself was not a common-law nuisance, and the Court specifically stated that it was the role of the legislature to determine what measures would be appropriate for the protection of public health and safety. See 123 US, at 661, 31 L Ed 205, 8 S Ct 273. In upholding the state action in Miller, the Court found it unnecessary to "weigh with nicety the question whether the infected cedars constitute a nuisance according to common law; or whether they may be so declared by statute." 276 US, at 280, 72 L Ed 568, 48 S Ct 246. See also Goldblatt,

14. "Indeed, it would be extraordinary to construe the Constitution to require a government to compensate private landowners because it denied them 'the right' to use property which cannot be used without risking injury and death." First Lutheran Church, 210 Cal App 3d, at 1366, 258 Cal Rptr, at ——.

15. Although it refers to state nuisance and property law, the Court apparently does not mean just any state nuisance and property law. Public nuisance was first a common-law creation, see Newark, The Boundaries of Nuisance, 65 LQ Rev 480, 482 (1949) (attributing development of nuisance to 1535), but by the 1800s in both the United States and England, legislatures had the power to define what is a public nuisance, and particular uses often have been selectively targeted. See Prosser, Private Action for Public Nuisance, 52 Va L Rev 997, 999-1000 (1966); J.F. Stephen, A General View of the Criminal Law of England 105-107 (2d ed 1890). The Court's references to "common-law" background principles, however, indicate that legislative determinations do not constitute "state nuisance and property law" for the Court.

16. Also, until today the fact that the regulation prohibited uses that were lawful at the time the owner purchased did not determine the constitutional question. The brewery, the brickyard, the cedar trees, and the gravel pit were all perfectly legitimate uses prior to the passage of the regulation. See Mugler v Kansas, 123 US 623, 654, 31 L Ed 205, 8 S Ct 273 (1887); Hadacheck v Sebastian, 239 US 394, 60 L Ed 348, 36 S Ct 143 (1915); Miller, 276 US, at 272, 72 L Ed 568, 48 S Ct 246; Goldblatt v Hempstead, 369 US 590, 8 L Ed 2d 130, 82 S Ct 987 (1962). This Court explicitly acknowledged in Hadacheck that "[a] vested interest cannot be asserted against [the police power] because of conditions once obtaining. To so hold would preclude development and fix a city forever in its primitive conditions." 239 US, at 410, 60 L Ed 348, 36 S Ct 143 (citation omitted).

369 US, at 593, 8 L Ed 2d 130, 82 S Ct 987; Hadacheck, 239 US, at 411, 60 L Ed 348, 36 S Ct 143. Instead the Court has relied in the past, as the South Carolina Court has done here, on legislative judgments of what constitutes a harm.[17]

The Court rejects the notion that the State always can prohibit uses it deems a harm to the public without granting compensation because "the distinction between 'harm-preventing' and 'benefit-conferring' regulation is often in the eye of the beholder." Ante, at ——, 120 L Ed 2d, at 818. Since the characterization will depend "primarily upon one's evaluation of the worth of competing uses of real estate," ante, at ——, 120 L Ed 2d, at 819, the Court decides a legislative judgment of this kind no longer can provide the desired "objective, value-free basis" for upholding a regulation. Ante, at ——, 120 L Ed 2d, at 819. The Court, however, fails to explain how its proposed common law alternative escapes the same trap.

The threshold inquiry for imposition of the Court's new rule, "deprivation of all economically valuable use," itself cannot be determined objectively. As the Court admits, whether the owner has been deprived of all economic value of his property will depend on how "property" is defined. The "composition of the denominator in our 'deprivation' fraction," ante, at ——, n 7, 120 L Ed 2d, at 813, is the dispositive inquiry. Yet there is no "objective" way to define what that denominator should be. "We have long understood that any land-use regulation can be characterized as the 'total' deprivation of an aptly defined entitlement. . . . Alternatively, the same regulation can always be characterized as a mere 'partial' withdrawal from full, unencumbered ownership of the landholding affected by the regulation. . . ."[18] Michelman, Takings, 1987, 88 Colum L Rev 1600, 1614 (1988).

The Court's decision in Keystone Bituminous Coal illustrates this principle perfectly. In Keystone, the Court determined that the "support estate" was "merely a part of the entire bundle of rights possessed by the owner." 480 US, at 501, 94 L Ed 2d 472, 107 S Ct 1232. Thus, the Court concluded that the support estate's destruction merely eliminated one segment of the total property. Ibid. The dissent, however, characterized the support estate as a distinct property interest that was

17. The Court argues that finding no taking when the legislature prohibits a harmful use, such as the Court did in Mugler and the South Carolina Supreme Court did in the instant case, would nullify Pennsylvania Coal. See ante, at ——, 120 L Ed 2d, at 817. Justice Holmes, the author of Pennsylvania Coal, joined Miller v Schoene, 276 US 272, 72 L Ed 568, 48 S Ct 246 (1928), six years later. In Miller, the Court adopted the exact approach of the South Carolina Court: It found the cedar trees harmful, and their destruction not a taking, whether or not they were a nuisance. Justice Holmes apparently believed that such an approach did not repudiate his earlier opinion. Moreover, this Court already has been over this ground five years ago, and at that point rejected the assertion that Pennsylvania Coal was inconsistent with Mugler, Hadacheck, Miller, or the others in the string of "noxious use" cases, recognizing instead that the nature of the State's action is critical in takings analysis. Keystone Bituminous Coal, 480 US, at 490, 94 L Ed 2d 472, 107 S Ct 1232.

18. See also Michelman, Property, Utility, and Fairness, Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv L Rev 1165, 1192-1193 (1967); Sax, Takings and the Police Power, 74 Yale LJ 36, 60 (1964).

wholly destroyed. Id., at 519, 94 L Ed 2d 472, 107 S Ct 1232. The Court could agree on no "value-free basis" to resolve this dispute.

Even more perplexing, however, is the Court's reliance on common-law principles of nuisance in its quest for a value-free taking jurisprudence. In determining what is a nuisance at common law, state courts make exactly the decision that the Court finds so troubling when made by the South Carolina General Assembly today: they determine whether the use is harmful. Common-law public and private nuisance law is simply a determination whether a particular use causes harm. See Prosser, Private Action for Public Nuisance, 52 Va L Rev 997, 997 (1966) ("Nuisance is a French word which means nothing more than harm"). There is nothing magical in the reasoning of judges long dead. They determined a harm in the same way as state judges and legislatures do today. If judges in the 18th and 19th centuries can distinguish a harm from a benefit, why not judges in the 20th century, and if judges can, why not legislators? There simply is no reason to believe that new interpretations of the hoary common law nuisance doctrine will be particularly "objective" or "value-free."[19] Once one abandons the level of generality of sic utere tuo ut alienum non laedas, ante, at ——, 120 L Ed 2d, at 823, one searches in vain, I think, for anything resembling a principle in the common law of nuisance.

C

Finally, the Court justifies its new rule that the legislature may not deprive a property owner of the only economically valuable use of his land, even if the legislature finds it to be a harmful use, because such action is not part of the "long recognized" "understandings of our citizens." Ante, at ——, 120 L Ed 2d, at 820. These "understandings" permit such regulation only if the use is a nuisance under the common law. Any other course is "inconsistent with the historical compact recorded in the Takings Clause." Ante, at ——, 120 L Ed 2d, at 820. It is not clear from the Court's opinion where our "historical compact" or "citizens' understanding" comes from, but it does not appear to be history.

The principle that the State should compensate individuals for property taken for public use was not widely established in America at the time of the Revolution.

> "The colonists . . . inherited . . . a concept of property which permitted extensive regulation of the use of that property for the public benefit—regulation that could even go so far as to deny all productive use of the property to the owner if, as Coke himself stated, the regulation 'extends to the public benefit . . . for this is for the

19. "There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance.' It has meant all things to all people, and has been applied indiscriminately to everything from an alarming advertisement to a cockroach baked in a pie." W. Keeton, D. Dobbs, R. Keeton, D. Owen, Prosser and Keeton on The Law of Torts 616 (5th ed 1984) (footnotes omitted). It is an area of law that "straddles the legal universe, virtually defies synthesis, and generates case law to suit every taste." W. Rodgers, Environmental Law § 2.4, at 48 (1986) (footnotes omitted). The Court itself has noted that "nuisance concepts" are "often vague and indeterminate." Milwaukee v Illinois, 451 US 304, 317, 68 L Ed 2d 114, 101 S Ct 1784 (1981).

public, and every one hath benefit by it.' "

F. Bosselman, D. Callies & J. Banta, The Taking Issue 80-81 (1973), quoting The Case of the King's Prerogative in Saltpetre, 12 Co Rep 12-13 (1606) (hereinafter Bosselman). See also Treanor, The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment, 94 Yale LJ 694, 697, n 9 (1985).[20]

Even into the 19th century, state governments often felt free to take property for roads and other public projects without paying compensation to the owners.[21] See M. Horwitz, The Transformation of American Law, 1780-1860, pp 63-64 (1977) (hereinafter Horwitz); Treanor, 94 Yale LJ, at 695. As one court declared in 1802, citizens "were bound to contribute as much of [land], as by the laws of the country, were deemed necessary for the public convenience." M'Clenachan v Curwin, 3 Yeates 362, 373 (Pa 1802). There was an obvious movement toward establishing the just compensation principle during the 19th century, but "there continued to be a strong current in American legal thought that regarded compensation simply as a 'bounty given . . . by the State' out of 'kindness' and not out of justice." Horwitz 65 (quoting Commonwealth v Fisher, 1 Pen & W 462, 465 (Pa 1830)). See also State v Dawson, 3 Hill 100, 103 (SC 1836)).[22]

Although, prior to the adoption of the Bill of Rights, America was replete with land use regulations describing which activities were considered noxious and forbidden, see Bender, The Takings Clause: Principles or Politics?, 34 Buffalo L Rev 735, 751 (1985); L. Friedman, A History of American Law 66-68 (1973), the Fifth Amendment's Taking Clause originally did not extend to regulations of property, whatever the effect.[23] See ante, at ——, 120 L Ed 2d, at 812. Most state courts

20. See generally Sax, 74 Yale LJ, at 56-59 "The evidence certainly seems to indicate that the mere fact that government activity destroyed existing economic advantages and power did not disturb [the English theorists who formulated the compensation notion] at all." Id., at 56 Professor Sax contends that even Blackstone, 'remembered champion of the language of private property," did not believe that the compensation clause was meant to preserve economic value. Id., at 58-59

21. In 1796, the Attorney General of South Carolina responded to property holders' demand for compensation when the State took their land to build a road by arguing that "there is not one instance on record, and certainly none within the memory of the oldest man now living, of any demand being made for compensation for the soil or freehold of the lands." Lindsay v Commissioners, 2 SC L 38, 49 (1796)

22. Only the constitutions of Vermont and Massachusetts required that compensation be paid when private property was taken for public use; and although eminent domain was mentioned in the Pennsylvania constitution, its sole requirement was that property not be taken without the consent of the legislature See Grant, The "Higher Law" Background of the Law of Eminent Domain, in 2 Selected Essays on Constitutional Law 912, 915-916 (1938) By 1868, five of the original States still had no just compensation clauses in their constitutions Ibid.

23. James Madison, author of the Taking Clause, apparently intended it to apply only to direct, physical takings of property by the Federal Government. See Treanor, The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment, 94 Yale LJ, 694, 711 (1985) Professor Sax argues that although "contemporaneous commentary upon the meaning of the compensation clause is in very short supply," 74 Yale LJ at 58, the "few authorities that are available" indicate that the clause was "designed to prevent arbitrary government action," not to protect economic value Id, at 58-60

agreed with this narrow interpretation of a taking. "Until the end of the nineteenth century . . . jurists held that the constitution protected possession only, and not value." Siegel, Understanding the Nineteenth Century Contract Clause: The Role of the Property-Privilege Distinction and "Takings" Clause Jurisprudence, 60 S Cal L Rev 1, 76 (1986); Bosselman 106. Even indirect and consequential injuries to property resulting from regulations were excluded from the definition of a taking. See Bosselman 106; Callender v Marsh, 1 Pick 418, 430 (Mass 1823).

Even when courts began to consider that regulation in some situations could constitute a taking, they continued to uphold bans on particular uses without paying compensation, notwithstanding the economic impact, under the rationale that no one can obtain a vested right to injure or endanger the public.[24] In the Coates cases, for example, the Supreme Court of New York found no taking in New York's ban on the interment of the dead within the city, although "no other use can be made of these lands." Coates v City of New York, 7 Cow 585, 592 (NY 1827). See also Brick Presbyterian Church v City of New York, 5 Cow 538 (NY 1826); Commonwealth v Alger, 7 Cush 53, 59, 104 (Mass 1851); St. Louis Gunning Advertisement Co. v St. Louis, 235 Mo 99, ——, 137 SW 929, 942 (1911), appeal dism'd, 231 US 761, 58 L Ed 470, 34 S Ct 325 (1913). More recent cases reach the same result. See Consolidated Rock Products Co. v Los Angeles, 57 Cal 2d 515, 370 P2d 342, appeal dism'd, 371 US 36, 9 L Ed 2d 112, 83 S Ct 145 (1962); Nassr v Commonwealth, 394 Mass 767, 477 NE2d 987 (1985); Eno v Burlington, 125 Vt 8, 209 A2d 499 (1965); Turner v County of Del Norte, 24 Cal App 3d 311, 101 Cal Rptr 93 (1972).

In addition, state courts historically have been less likely to find that a government action constitutes a taking when the affected land is undeveloped. According to the South Carolina court, the power of the legislature to take unimproved land without providing compensation was sanctioned by "ancient rights and principles." Lindsay v Commissioners, 2 SC L 38, 57 (1796). "Except for Massachusetts, no colony appears to have paid compensation when it built a stateowned road across unimproved land. Legislatures provided compensation only for enclosed or improved land." Treanor, 94 Yale LJ, at 695 (footnotes omitted). This rule was followed by some States into the 1800s. See Horwitz 63-65.

With similar result, the common agrarian conception of property limited owners to "natural" uses of their land prior to and during much of the 18th century. See id., at 32. Thus, for example, the owner could

24. For this reason, the retroactive application of the regulation to formerly lawful uses was not a controlling distinction in the past. "Nor can it make any difference that the right is purchased previous to the passage of the by-law," for "[e]very right, from an absolute ownership in property, down to a mere easement, is purchased and holden subject to the restriction, that it shall be so exercised as not to injure others. Though, at the time, it be remote and inoffensive, the purchaser is bound to know, at his peril, that it may become otherwise." Coates v City of New York, 7 Cow 585, 605 (NY 1827). See also Brick Presbyterian Church v City of New York, 5 Cow 538, 542 (NY 1826); Commonwealth v Tewksbury, 11 Metc 55 (Mass 1846); State v Paul, 5 RI 185 (1858).

build nothing on his land that would alter the natural flow of water. See id., at 44; see also, e.g., Merritt v Parker, 1 Coxe 460, 463 (NJ 1795). Some more recent state courts still follow this reasoning. See, e.g., Just v Marinette County, 56 Wis 2d 7, 201 NW2d 761, 768 (1972).

Nor does history indicate any common-law limit on the State's power to regulate harmful uses even to the point of destroying all economic value. Nothing in the discussions in Congress concerning the Taking Clause indicates that the Clause was limited by the common-law nuisance doctrine. Common law courts themselves rejected such an understanding. They regularly recognized that it is "for the legislature to interpose, and by positive enactment to prohibit a use of property which would be injurious to the public." Tewksbury, 11 Metc, at 57.[25] Chief Justice Shaw explained in upholding a regulation prohibiting construction of wharves, the existence of a taking did not depend on "whether a certain erection in tide water is a nuisance at common law or not." Alger, 7 Cush, at 104; see also State v Paul, 5 RI 185, 193 (1858); Commonwealth v Parks, 155 Mass 531, 532, 30 NE 174 (1892) (Holmes, J.) ("[T]he legislature may change the common law as to nuisances, and may move the line either way, so as to make things nuisances which were not so, or to make things lawful which were nuisances").

In short, I find no clear and accepted "historical compact" or "understanding of our citizens" justifying the Court's new taking doctrine. Instead, the Court seems to treat history as a grab-bag of principles, to be adopted where they support the Court's theory, and ignored where they do not. If the Court decided that the early common law provides the background principles for interpreting the Taking Clause, then regulation, as opposed to physical confiscation, would not be compensable. If the Court decided that the law of a later period provides the background principles, then regulation might be compensable, but the Court would have to confront the fact that legislatures regularly determined which uses were prohibited, independent of the common law, and independent of whether the uses were lawful when the owner purchased. What makes the Court's analysis unworkable is its attempt to package the law of two incompatible eras and peddle it as historical fact.[26]

V

The Court makes sweeping and, in my view, misguided and unsupported changes in our taking doctrine. While it limits these changes to the most narrow subset of govern-

---

25. More recent state court decisions agree. See e.g., Lane v Mt Vernon, 38 NY2d 344, 342 NE2d 571, 573 (1976); Commonwealth v Baker, 160 Pa Super 640, 53 A2d 829, 830 (1947).

26. The Court asserts that all early American experience, prior to and after passage of the Bill of Rights, and any case law prior to 1897 are "entirely irrelevant" in determining what is "the historical compact recorded in the Takings Clause." Ante, at ——, n 15, 120 L Ed 2d, at 820. Nor apparently are we to find this compact in the early federal taking cases, which clearly permitted prohibition of harmful uses despite the alleged loss of all value, whether or not the prohibition was a common-law nuisance, and whether or not the prohibition occurred subsequent to the purchase. See supra, at ——, ——, 120 L Ed 2d, at 833-834, 836-837, and n 16. I cannot imagine where the Court finds its "historical compact," if not in history.

ment regulation—those that eliminate all economic value from land—these changes go far beyond what is necessary to secure petitioner Lucas' private benefit. One hopes they do not go beyond the narrow confines the Court assigns them to today.

I dissent.

Justice **Stevens,** dissenting.

Today the Court restricts one judge-made rule and expands another. In my opinion it errs on both counts. Proper application of the doctrine of judicial restraint would avoid the premature adjudication of an important constitutional question. Proper respect for our precedents would avoid an illogical expansion of the concept of "regulatory takings."

I

As the Court notes, ante, at ——, 120 L Ed 2d, at 809, South Carolina's Beachfront Management Act has been amended to permit some construction of residences seaward of the line that frustrated petitioner's proposed use of his property. Until he exhausts his right to apply for a special permit under that amendment, petitioner is not entitled to an adjudication by this Court of the merits of his permanent takings claim. MacDonald, Sommer & Frates v County of Yolo, 477 US 340, 351, 91 L Ed 2d 285, 106 S Ct 2561 (1986).

It is also not clear that he has a viable "temporary takings" claim. If we assume that petitioner is now able to build on the lot, the only injury that he may have suffered is the delay caused by the temporary existence of the absolute statutory ban on construction. We cannot be sure, however, that that delay caused petitioner any harm because the record does not tell us whether his building plans were even temporarily frustrated by the enactment of the statute.[1] Thus, on the present record it is entirely possible that petitioner has suffered no injury-in-fact even if the state statute was unconstitutional when he filed this lawsuit.

It is true, as the Court notes, that the argument against deciding the constitutional issue in this case rests on prudential considerations rather than a want of jurisdiction. I think it equally clear, however, that a Court less eager to decide the merits would follow the wise counsel of Justice Brandeis in his deservedly famous concurring opinion in Ashwander v Tennessee Valley Authority, 297 US 288, 341, 80 L Ed 688, 56 S Ct 466 (1936). As he explained, the Court has developed "for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision." Id. at 346, 80 L Ed 688, 56 S Ct 466. The second of those rules applies directly to this case.

> "2. The Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it.' Liverpool, N.Y. & P.S.S. Co. v Emigration Commissioners, 113

1. In this regard, it is noteworthy that petitioner acquired the lot about 18 months before the statute was passed; there is no evidence that he ever sought a building permit from the local authorities.

US 33, 39 '28 L Ed 899, 5 S Ct 352]; [citing five additional cases]. 'It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.' Burton v United States 196 US 283, 295 [49 L Ed 482, 25 S Ct 243]." Id., at 346-347, 91 L Ed 2d 285, 106 S Ct 2561.

Cavalierly dismissing the doctrine of judicial restraint, the Court today tersely announces that "we do not think it prudent to apply that prudential requirement here." Ante, at ——, 120 L Ed 2d, at 811. I respectfully disagree and would save consideration of the merits for another day. Since, however, the Court has reached the merits, I shall do so as well.

II

In its analysis of the merits, the Court starts from the premise that this Court has adopted a "categorical rule that total regulatory takings must be compensated," ante, at ——, 120 L Ed 2d, at 819, and then sets itself to the task of identifying the exceptional cases in which a State may be relieved of this categorical obligation. Ante, at ——-——, 120 L Ed 2d, at 820. The test the Court announces is that the regulation must do no more than duplicate the result that could have been achieved under a State's nuisance law. Ante, at ——, 120 L Ed 2d, at 821. Under this test the categorical rule will apply unless the regulation merely makes explicit what was otherwise an implicit limitation on the owner's property rights.

In my opinion, the Court is doubly in error. The categorical rule the Court establishes is an unsound and unwise addition to the law and the Court's formulation of the exception to that rule is too rigid and too narrow.

The Categorical Rule

As the Court recognizes, ante, at ——, 120 L Ed 2d, at 812, Pennsylvania Coal Co. v Mahon, 260 US 393, 67 L Ed 322, 43 S Ct 158, 28 ALR 1321 (1922), provides no support for its—or, indeed, any—categorical rule. To the contrary, Justice Holmes recognized that such absolute rules ill fit the inquiry into "regulatory takings." Thus, in the paragraph that contains his famous observation that a regulation may go "too far" and thereby constitute a taking, the Justice wrote: "As we already have said, this is a question of degree—and therefore cannot be disposed of by general propositions." Id. at 416, 67 L Ed 322, 43 S Ct 158, 28 ALR 1321. What he had "already. . .said" made perfectly clear that Justice Holmes regarded economic injury to be merely one factor to be weighed: "One fact for consideration in determining such limits is the extent of the diminution [of value.] So the question depends upon the particular facts." Id. at 413, 67 L Ed 322, 43 S Ct 158, 28 ALR 1321.

Nor does the Court's new categorical rule find support in decisions following Mahon. Although in dicta we have sometimes recited that a law "effects a taking if [it] . . . denies an owner economically viable use of his land," Agins v Tiburon, 447 US 255, 260, 65 L Ed 2d 106, 100 S Ct 2138 (1980), our *rulings* have rejected such an absolute position. We have frequently—and recently—held that, in some circumstances, a law that renders property valueless may nonetheless not constitute a taking. See, e.g., First English Evan-

gelical Lutheran Church of Glendale v County of Los Angeles, 482 US 304, 313, 96 L Ed 2d 250, 107 S Ct 2378 (1987); Goldblatt v Hempstead, 369 US 590, 596, 8 L Ed 2d 130, 82 S Ct 987 (1962); United States v Caltex, 344 US 149, 155, 97 L Ed 157, 73 S Ct 200 (1952); Miller v Schoene, 276 US 272, 72 L Ed 568, 48 S Ct 246 (1928); Hadachek v Sebastian, 239 US 394, 405, 60 L Ed 348, 36 S Ct 143 (1915); Mugler v Kansas, 123 US 623, 657, 31 L Ed 205, 8 S Ct 273 (1887); cf. Ruckelshaus v Monsanto Co., 467 US 986, 1011, 81 L Ed 2d 815, 104 S Ct 2862 (1984); Connolly v Pension Benefit Guaranty Corporation, 475 US 211, 225, 89 L Ed 2d 166, 106 S Ct 1018 (1986). In short, as we stated in Keystone Bituminous Coal Assn. v DeBenedictis, 480 US 470, 490, 94 L Ed 2d 472, 107 S Ct 1232 (1987), " 'Although a comparison of values before and after' a regulatory action 'is relevant, . . . it is by no means conclusive.' "

In addition to lacking support in past decisions, the Court's new rule is wholly arbitrary. A landowner whose property is diminished in value 95% recovers nothing, while an owner whose property is diminished 100% recovers the land's full value. The case at hand illustrates this arbitrariness well. The Beachfront Management Act not only prohibited the building of new dwellings in certain areas, it also prohibited the rebuilding of houses that were "destroyed beyond repair by natural causes or by fire." 1988 SC Acts 634, § 3; see also Esposito v South Carolina Coastal Council, 939 F2d 165, 167 (CA4 1991).[2] Thus, if the homes adjacent to Lucas' lot were destroyed by a hurricane one day after the Act took effect, the owners would not be able to rebuild, nor would they be assured recovery. Under the Court's categorical approach, Lucas (who has lost the opportunity to build) recovers, while his neighbors (who have lost *both* the opportunity to build *and* their homes) do not recover. The arbitrariness of such a rule is palpable.

Moreover, because of the elastic nature of property rights, the Court's new rule will also prove unsound in practice. In response to the rule, courts may define "property" broadly and only rarely find regulations to effect total takings. This is the approach the Court itself adopts in its revisionist reading of venerable precedents. We are told that—notwithstanding the Court's findings to the contrary in each case—the brewery in Mugler, the brickyard in Hadacheck, and the gravel pit in Goldblatt all could be put to "other uses" and that, therefore, those cases did not involve total regulatory takings.[3] Ante, at ——, n 13, 120 L Ed 2d, at 819-820.

---

2. This aspect of the Act was amended in 1990. See SC Code § 48-39-290(B) (Supp 1990).

3. Of course, the same could easily be said in this case: Lucas may put his land to "other uses"—fishing or camping, for example—or may sell his land to his neighbors as a buffer. In either event, his land is far from "valueless."

This highlights a fundamental weakness in the Court's analysis: its failure to explain why only the impairment of "*economically* beneficial or productive use," ante, at — –, 120 L Ed 2d, at 813 (emphasis added), of property is relevant in takings analysis. I should think that a regulation arbitrarily prohibiting an owner from continuing to use her property for bird-watching or sunbathing might constitute a taking under some circumstances; and, conversely, that such uses are of value to the owner. Yet the Court offers no basis for its assumption that the only uses of property cognizable under the Constitution are *developmental* uses.

On the other hand, developers and investors may market specialized estates to take advantage of the Court's new rule. The smaller the estate, the more likely that a regulatory change will effect a total taking. Thus, an investor may, for example, purchase the right to build a multifamily home on a specific lot, with the result that a zoning regulation that allows only single-family homes would render the investor's property interest "valueless."[4] In short, the categorical rule will likely have one of two effects: Either courts will alter the definition of the "denominator" in the takings "fraction," rendering the Court's categorical rule meaningless, or investors will manipulate the relevant property interests, giving the Court's rule sweeping effect. To my mind, neither of these results is desirable or appropriate, and both are distortions of our takings jurisprudence.

Finally, the Court's justification for its new categorical rule is remarkably thin. The Court mentions in passing three arguments in support of its rule; none is convincing. First, the Court suggests that "total deprivation of feasible use is, from the landowner's point of view, the equivalent of a physical appropriation." Ante, at ——, 120 L Ed 2d, at 814. This argument proves too much. From the "landowner's point of view," a regulation that diminishes a lot's value by 50% is as well "the equivalent" of the condemnation of half of the lot. Yet, it is well established that a 50% diminution in value does not by itself constitute a taking. See Euclid v Ambler Realty Co., 272 US 365, 384, 71 L Ed 303, 47 S Ct 114, 54 ALR 1016 (1926) (75% diminution in value). Thus, the landowner's perception of the regulation cannot justify the Court's new rule.

Second, the Court emphasizes that because total takings are "relatively rare" its new rule will not adversely affect the government's ability to "go on." Ante, at ——, 120 L Ed 2d, at 814. This argument proves too little. Certainly it is true that defining a small class of regulations that are per se takings will not greatly hinder important governmental functions—but this is true of *any* small class of regulations. The Court's suggestion only begs the question of why regulations of *this* particular class should always be found to effect takings.

Finally, the Court suggests that "regulations that leave the owner . . . without economically beneficial . . . use . . . carry with them a heightened risk that private property is being pressed into some form of public service." Ibid. As discussed more fully below, see infra, Part III, I agree that the risks of such singling out are of central concern in takings law. However, such risks do not justify a per se rule for total regulatory takings. There is no necessary correlation between "singling out" and total takings: a regulation may single out a property owner

4. This unfortunate possibility is created by the Court's subtle revision of the "total regulatory takings" dicta. In past decisions, we have stated that a regulation effects a taking if it "denies an owner economically viable use of his *land*," Agins v Tiburon, 447 US, 255, 260, 65 L Ed 2d 106, 100 S Ct 2138 (1980) (emphasis added), indicating that this "total takings" test did not apply to other estates. Today, however, the Court suggests that a regulation may effect a total taking of *any* real property interest. See ante, at ——, n 7, 120 L Ed 2d, at 813-814.

without depriving him of all of his property, see e.g., Nollan v California Coastal Comm'n, 483 US 825, 837, 97 L Ed 2d 677, 107 S Ct 3141 (1987); J.E.D. Associates, Inc. v Atkinson, 121 NH 581, 432 A2d 12 (1981); and it may deprive him of all of his property without singling him out, see e.g., Mugler v Kansas, 123 US 623, 31 L Ed 205, 8 S Ct 273 (1887); Hadachek v Sebastian, 239 US 394, 60 L Ed 348, 36 S Ct 143 (1915). What matters in such cases is not the degree of diminution of value, but rather the specificity of the expropriating act. For this reason, the Court's third justification for its new rule also fails.

In short, the Court's new rule is unsupported by prior decisions, arbitrary and unsound in practice, and theoretically unjustified. In my opinion, a categorical rule as important as the one established by the Court today should be supported by more history or more reason than has yet been provided.

The Nuisance Exception

Like many bright-line rules, the categorical rule established in this case is only "categorical" for a page or two in the U. S. Reports. No sooner does the Court state that "total regulatory takings must be compensated," ante, at ——, 120 L Ed 2d, at 819, than it quickly establishes an exception to that rule.

The exception provides that a regulation that renders property valueless is not a taking if it prohibits uses of property that were not "previously permissible under relevant property and nuisance principles." Ante, at ——, 120 L Ed 2d, at 821. The Court thus rejects the basic holding in Mugler v Kansas, 123 US 623, 31 L Ed 205, 8 S Ct 273 (1887). There we held that a state-wide statute that prohibited the owner of a brewery from making alcoholic beverages did not effect a taking, even though the use of the property had been perfectly lawful and caused no public harm before the statute was enacted. We squarely rejected the rule the Court adopts today:

> "It is true, that, when the defendants . . . erected their breweries, the laws of the State did not forbid the manufacture of intoxicating liquors. But the State did not thereby give any assurance, or come under an obligation, that its legislation upon that subject would remain unchanged. [T]he supervision of the public health and the public morals is a governmental power, 'continuing in its nature,' and 'to be dealt with as the special exigencies of the moment may require;' . . . 'for this purpose, the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself.' " Id., at 669, 31 L Ed 205, 8 S Ct 273.

Under our reasoning in Mugler, a state's decision to prohibit or to regulate certain uses of property is not a compensable taking just because the particular uses were previously lawful. Under the Court's opinion today, however, if a state should decide to prohibit the manufacture of asbestos, cigarettes, or concealable firearms, for example, it must be prepared to pay for the adverse economic consequences of its decision. One must wonder if Government will be able to "go on" effectively if it must risk compensation "for every such change in the general law." Mahon, 260 US, at 413, 67 L Ed 322, 43 S Ct 158, 28 ALR 1321.

The Court's holding today effectively freezes the State's common law, denying the legislature much of its traditional power to revise the law governing the rights and uses of property. Until today, I had thought that we had long abandoned this approach to constitutional law. More than a century ago we recognized that "the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances." Munn v Illinois, 94 US 113, 134, 24 L Ed 77 (1877). As Justice Marshall observed about a position similar to that adopted by the Court today:

> "If accepted, that claim would represent a return to the era of Lochner v New York, 198 US 45 [49 L Ed 937, 25 S Ct 539] (1905), when common-law rights were also found immune from revision by State or Federal Government. Such an approach would freeze the common law as it has been constructed by the courts, perhaps at its 19th-century state of development. It would allow no room for change in response to changes in circumstance. The Due Process Clause does not require such a result." PruneYard Shopping Center v Robins, 447 US 74, 93, 64 L Ed 2d 741, 100 S Ct 2035 (1980) (concurring opinion).

Arresting the development of the common law is not only a departure from our prior decisions; it is also profoundly unwise. The human condition is one of constant learning and evolution—both moral and practical. Legislatures implement that new learning; in doing so they must often revise the definition of property and the rights of property owners. Thus, when the Nation came to understand that slavery was morally wrong and mandated the emancipation of all slaves, it, in effect, redefined "property." On a lesser scale, our ongoing self-education produces similar changes in the rights of property owners: New appreciation of the significance of endangered species, see, e.g., Andrus v Allard, 444 US 51, 62 L Ed 2d 210, 100 S Ct 318 (1979); the importance of wetlands, see, e.g., 16 USC § 3801 et seq. [16 USCS §§ 3801 et seq.]; and the vulnerability of coastal lands, see, e.g., 16 USC § 1451 et seq. [16 USCS §§ 1451 et seq.], shapes our evolving understandings of property rights.

Of course, some legislative redefinitions of property will effect a taking and must be compensated—but it certainly cannot be the case that every movement away from common law does so. There is no reason, and less sense, in such an absolute rule. We live in a world in which changes in the economy and the environment occur with increasing frequency and importance. If it was wise a century ago to allow Government " 'the largest legislative discretion' " to deal with " 'the special exigencies of the moment,' " Mugler, 123 US, at 669, 31 L Ed 205, 8 S Ct 273, it is imperative to do so today. The rule that should govern a decision in a case of this kind should focus on the future, not the past.[5]

---

5. Even measured in terms of efficiency, the Court's rule is unsound. The Court today effectively establishes a form of insurance against certain changes in landuse regulations. Like other forms of insurance, the Court's rule creates a "moral hazard" and inefficiencies: In the face of uncertainty about changes in the law, developers will overinvest, safe in the knowledge that if the law changes adversely, they will be entitled to compensa-

* * *

The Court's categorical approach rule will, I fear, greatly hamper the efforts of local officials and planners who must deal with increasingly complex problems in land-use and environmental regulation. As this case—in which the claims of an *individual* property owner exceed $1 million—well demonstrates, these officials face both substantial uncertainty because of the ad hoc nature of takings law and unacceptable penalties if they guess incorrectly about that law.[6]

Viewed more broadly, the Court's new rule and exception conflict with the very character of our takings jurisprudence. We have frequently and consistently recognized that the definition of a taking cannot be reduced to a "set formula" and that determining whether a regulation is a taking is "essentially [an] ad hoc, factual inquir[y]." Penn Central Transportation Co. v New York City, 438 US 104, 124, 57 L Ed 2d 631, 98 S Ct 2646 (1978) (quoting Goldblatt v Hempstead, 369 US 590, 594, 8 L Ed 2d 130, 82 S Ct 987 (1962)). This is unavoidable, for the determination whether a law effects a taking is ultimately a matter of "fairness and justice," Armstrong v United States, 364 US 40, 49, 4 L Ed 2d 1554, 80 S Ct 1563 (1960), and "necessarily requires a weighing of private and public interests." Agins, 447 US, at 261, 65 L Ed 2d 106, 100 S Ct 2138. The rigid rules fixed by the Court today clash with this enterprise: "fairness and justice" are often disserved by categorical rules.

III

It is well established that a takings case "entails inquiry into [several factors:] the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations." PruneYard, 447 US, at 83, 64 L Ed 2d 741, 100 S Ct 2035. The Court's analysis today focuses on the last two of these three factors: the categorical rule addresses a regulation's "economic impact," while the nuisance exception recognizes that ownership brings with it only certain "expectations." Neglected by the Court today is the first, and in some ways, the most important factor in takings analysis: the character of the regulatory action.

The Just Compensation Clause "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." Armstrong, 364 US, at 49, 4 L Ed 2d 1554, 80 S Ct 1563. Accordingly, one of the central concerns of our takings jurisprudence is "prevent[ing] the public from loading upon one individual more than his just share of the burdens of government." Mo-

tion. See generally Farber, Economic Analysis and Just Compensation, 12 Int'l Rev of Law & Econ 125 (1992).

6. As the Court correctly notes, in regulatory takings, unlike physical takings, courts have a choice of remedies. See ante, at ——, n 17, 120 L Ed 2d, at 822. They may "invalidat[e the] excessive regulation" or they may "allo[w] the regulation to stand and orde[r] the government to afford compensation for the permanent taking." First English Evangelical Lutheran Church v County of Los Angeles, 482 US 304, 335, 96 L Ed 2d 250, 107 S Ct 2378 (1987) (Stevens, J., dissenting); see also id., at 319-321, 96 L Ed 2d 250, 107 S Ct 2378. In either event, however, the costs to the government are likely to be substantial and are therefore likely to impede the development of sound land-use policy.

nongahela Navigation Co. v United States, 148 US 312, 325, 37 L Ed 463, 13 S Ct 622 (1893). We have, therefore, in our takings law frequently looked to the *generality* of a regulation of property.[7]

For example, in the case of so-called "developmental exactions," we have paid special attention to the risk that particular landowners might "b[e] singled out to bear the burden" of a broader problem not of his own making. Nollan, 483 US, at 835, n 4, 97 L Ed 2d 677, 107 S Ct 3141; see also Pennell v San Jose, 485 US 1, 23, 99 L Ed 2d 1, 108 S Ct 849 (1988). Similarly, in distinguishing between the Kohler Act (at issue in Mahon) and the Subsidence Act at issue in Keystone), we found significant that the regulatory function of the latter was substantially broader. Unlike the Kohler Act, which simply transferred back to the surface owners certain rights that they had earlier sold to the coal companies, the Subsidence Act affected all surface owners—including the coal companies—equally. See Keystone, 480 US, at 486, 94 L Ed 2d 472, 107 S Ct 1232. Perhaps the most familiar application of this principle of generality arises in zoning cases. A diminution in value caused by a zoning regulation is far less likely to constitute a taking if it is part of a general and comprehensive land-use plan, see Euclid v Amber Realty Co., 272 US 365, 71 L Ed 303, 47 S Ct 114, 54 ALR 1016 (1926); conversely, "spot zoning" is far more likely to constitute a taking, see Penn Central, 438 US, at 132, and n 28, 57 L Ed 2d 631, 98 S Ct 2646.

The presumption that a permanent physical occupation, no matter how slight, effects a taking is wholly consistent with this principle. A physical taking entails a certain amount of "singling out."[8] Consistent with this principle, physical oc-

7. This principle of generality is well-rooted our broader understandings of the Constition as designed in part to control the "misefs of faction." See The Federalist No. 10, p G. Wills ed 1982) (J. Madison).

An analogous concern arises in First endment law. There we have recognized t an individual's rights are not violated en his religious practices are prohibited ier a neutral law of general applicability. example, in Employment Division, Dertment of Human Resources of Oregon v th, 494 US 872, 879-880, 108 L Ed 2d 876, S Ct 1595 (1990), we observed:

Our] decisions have consistently held that right of free exercise does not relieve an vidual of the obligation to comply with a d and neutral law of general applicability the ground that the law proscribes (or cribes) conduct that his religion prees (or proscribes).' United States v Lee, US 252, 263, n 3 [71 L Ed 2d 127, 102 S 1051] (1982) (Stevens, J., concurring in ment). . . . In Prince v Massachusetts, US 158 [88 L Ed 645, 64 S Ct 438] (1944), held that a mother could be prosecuted under the child labor laws for using her children to dispense literature in the streets, her religious motivation notwithstanding. We found no constitutional infirmity in 'excluding [these children] from doing there what no other children may do.' Id., at 171 [88 L Ed 645, 64 S Ct 438]. In Braunfeld v Brown, 366 US 599 [6 L Ed 2d 563, 81 S Ct 1144] (1961) (plurality opinion), we upheld Sunday-closing laws against the claim that they burdened the religious practices of persons whose religions compelled them to refrain from work on other days. In Gillette v United States, 401 US 437, 461 [28 L Ed 2d 168, 91 S Ct 828] (1971), we sustained the military Selective Service System against the claim that it violated free exercise by conscripting persons who opposed a particular war on religious grounds."

If such a neutral law of general applicability may severely burden constitutionally protected interests in liberty, a comparable burden on property owners should not be considered unreasonably onerous.

8. See Levmore, Takings, Torts, and Special Interests, 77 Va L Rev 1333, 1352-1354 (1991).

cupations by third parties are more likely to effect takings than other physical occupations. Thus, a regulation requiring the installation of a junction box owned by a third party, Loretto v Teleprompter Manhattan CATV Corp., 458 US 419, 73 L Ed 2d 868, 102 S Ct 3164 (1982), is more troubling than a regulation requiring the installation of sprinklers or smoke detectors; just as an order granting third parties access to a marina, Kaiser Aetna v United States, 444 US 164, 62 L Ed 2d 332, 100 S Ct 383 (1979), is more troubling than an order requiring the placement of safety buoys in the marina.

In analyzing takings claims, courts have long recognized the difference between a regulation that targets one or two parcels of land and a regulation that enforces a state-wide policy. See, e.g., A.A. Profiles, Inc. v Ft. Lauderdale, 850 F2d 1483, 1488 (CA11 1988); Wheeler v Pleasant Grove, 664 F2d 99, 100 (CA5 1981); Trustees Under Will of Pomeroy v Westlake, 357 So 2d 1299, 1304 (La App 1978); see also Burrows v Keene, 121 NH 590, 432 A2d 15, 21 (1981); Herman Glick Realty Co. v St. Louis County, 545 SW2d 320, 324-325 (Mo App 1976); Huttig v Richmond Heights, 372 SW2d 833, 842-843 (Mo 1963). As one early court stated with regard to a waterfront regulation, "If such restraint were in fact imposed upon the estate of one proprietor only, out of several estates on the same line of shore, the objection would be much more formidable." Commonwealth v Alger, 61 Mass 53, 102 (1851).

In considering Lucas' claim, the generality of the Beachfront Management Act is significant. The Act does not target particular landowners, but rather regulates the use of the coastline of the entire State. See SC Code § 48-39-10 (Supp 1990). Indeed, South Carolina's Act is best understood as part of a national effort to protect the coastline, one initiated by the Federal Coastal Zone Management Act of 1972. Pub L 92-583, 86 Stat 1280, codified as amended at 16 USC § 1451 et seq. [16 USCS §§ 1451 et seq.]. Pursuant to the Federal Act, every coastal State has implemented coastline regulations.[9] Moreover, the Act did not single out owners of undeveloped land. The Act also prohibited owners of developed land from rebuilding if their structures were destroyed, see 1988 SC Acts 634 § 3,[10] and what is equally significant, from repairing erosion control devices, such as seawalls, see SC Code § 48-39-290(B)(2) (Supp 1990). In addition, in some situations, owners of developed land were required to "renouris[h] the beach . . . on a yearly basis with an amount . . . of sand . . . not . . . less than one and one-half times the yearly volume of sand lost due to erosion." 1988 SC Acts 634 § 3, p 5140.[11] In short, the South Carolina Act imposed substantial burdens on owners of developed and undevel-

9. See Zalkin, Shifting Sands and Shifting Doctrines: The Supreme Court's Changing Takings Doctrine and South Carolina's Coastal Zone Statute, 79 Cal L Rev 205, 216-217, nn 46-47 (1991) (collecting statutes).

10. This provision was amended in 1990. See SC Code § 48-39-290(B) (Supp 1990).

11. This provision was amended in 1990; authority for renourishment was shifted to local governments. See SC Code § 48-39-350(A) (Supp 1990).

oped land alike [12] This generality indicates that the Act is not an effort to expropriate owners of undeveloped land

Admittedly, the economic impact of this regulation is dramatic and petitioner's investment-backed expectations are substantial Yet, if anything, the costs to and expectations of the owners of developed land are even greater I doubt, however, that the cost to owners of developed land of renourishing the beach and allowing their seawalls to deteriorate effects a taking The costs imposed on the owners of undeveloped land, such as petitioner, differ from these costs only in degree, not in kind

The impact of the ban on developmental uses must also be viewed in light of the purposes of the Act The legislature stated the purposes of the Act as "protect[ing], preserv[ing], restor[ing] and enhanc[ing] the beach/dune system ' of the State not only for recreational and ecological purposes but also to "protec[t] life and property " SC Code § 48-39-260(1)(a) (Supp 1990) The State, with much science on its side, believes that the "beach/dune system [acts] as a buffer from high tides, storm surge, [and] hurricanes " Ibid This is a traditional and important exercise of the State's police power, as demonstrated by Hurricane Hugo, which in 1989, caused 29 deaths and more than $6 billion in property damage in South Carolina alone [13]

In view of all of these factors, even assuming that petitioner's property was rendered valueless, the risk inherent in investments of the sort made by petitioner, the generality of the Act, and the compelling purpose motivating the South Carolina Legislature persuade me that the Act did not effect a taking of petitioner's property

Accordingly, I respectfully dissent

Statement of Justice **Souter.**

I would dismiss the writ of certiorari in this case as having been granted improvidently After briefing and argument it is abundantly clear that an unreviewable assumption on which this case comes to us is both questionable as a conclusion of Fifth Amendment law and sufficient to frustrate the Court's ability to render certain the legal premises on which its holding rests

The petition for review was granted on the assumption that the state by regulation had deprived the owner of his entire economic interest in the subject property Such was the state trial court's conclusion, which the state supreme court did not review It is apparent now that in light of our prior cases, see e g , Keystone Bituminous Coal Assn v DeBenedictis, 480 US 470, 493 502, 94 L Ed 2d 472, 107 S Ct 1232 (1987), Andrus v Allard, 444 US 51, 65-66, 62 L Ed 2d 210, 100 S Ct 318 (1979), Penn Central Transportation Corp v New York City, 438 US 104, 130-131,

12. In this regard the Act more closely resembles the Subsidence Act in Kevstone than the Kohler Act in Pennsylvania Coal Co v Mahon 260 US 393 67 L Ed 322 43 S Ct 158 28 ALR 1321 (1922) and more closely resembles the general zoning scheme in Euclid v Amber Realty Co 272 US 365 71 L Ed 303 47 S Ct 114 54 ALR 1016 (1926) than the specific landmark designation in Penn Central Transportation Co v New York City 438 US 104 57 L Ed 2d 631 98 S Ct 2646 (1978)

13 Zalkin 79 Cal L Rev at 212 213

57 L Ed 2d 631, 98 S Ct 2646 (1978), the trial court's conclusion is highly questionable. While the respondent now wishes to contest the point, see Brief for Respondent 45-50, the Court is certainly right to refuse to take up the issue, which is not fairly included within the question presented, and has received only the most superficial and one-sided treatment before us.

Because the questionable conclusion of total deprivation cannot be reviewed, the Court is precluded from attempting to clarify the concept of total (and, in the Court's view, categorically compensable) taking on which it rests, a concept which the Court describes, see ante, at —— n 6, 120 L Ed 2d, at 813, as so uncertain under existing law as to have fostered inconsistent pronouncements by the Court itself. Because that concept is left uncertain, so is the significance of the exceptions to the compensation requirement that the Court proceeds to recognize. This alone is enough to show that there is little utility in attempting to deal with this case on the merits.

The imprudence of proceeding to the merits in spite of these unpromising circumstances is underscored by the fact that, in doing so, the Court cannot help but assume something about the scope of the uncertain concept of total deprivation, even when it is barred from explicating total deprivation directly. Thus, when the Court concludes that the application of nuisance law provides an exception to the general rule that complete denial of economically beneficial use of property amounts to a compensable taking, the Court will be understood to suggest (if it does not assume) that there are in fact circumstances in which state-law nuisance abatement may amount to a denial of all beneficial land use as that concept is to be employed in our takings jurisprudence under the Fifth and Fourteenth Amendments. The nature of nuisance law, however, indicates that application of a regulation defensible on grounds of nuisance prevention or abatement will quite probably not amount to a complete deprivation in fact. The nuisance enquiry focuses on conduct, not on the character of the property on which that conduct is performed, see 4 Restatement (Second) of Torts § 821B (1979) (public nuisance); id., § 822 (private nuisance), and the remedies for such conduct usually leave the property owner with other reasonable uses of his property, see W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 90 (5th ed 1984) (public nuisances usually remedied by criminal prosecution or abatement), id., § 89 (private nuisances usually remedied by damages, injunction or abatement); see also, e.g., Mugler v Kansas, 123 US 623, 668-669, 31 L Ed 205, 8 S Ct 273 (1887) (prohibition on use of property to manufacture intoxicating beverages "does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use . . . for certain forbidden purposes, is prejudicial to the public interests"); Hadacheck v Sebastian, 239 US 394, 412, 60 L Ed 348, 36 S Ct 143 (1915) (prohibition on operation of brickyard did not prohibit extraction of clay from which bricks were produced). Indeed, it is difficult to imagine property that can be used only to

57 L Ed 2d 631, 98 S Ct 2646 (1978), the trial court's conclusion is highly questionable. While the respondent now wishes to contest the point, see Brief for Respondent 45-50, the Court is certainly right to refuse to take up the issue, which is not fairly included within the question presented, and has received only the most superficial and one-sided treatment before us.

Because the questionable conclusion of total deprivation cannot be reviewed, the Court is precluded from attempting to clarify the concept of total (and, in the Court's view, categorically compensable) taking on which it rests, a concept which the Court describes, see ante, at —— n 6, 120 L Ed 2d, at 813, as so uncertain under existing law as to have fostered inconsistent pronouncements by the Court itself. Because that concept is left uncertain, so is the significance of the exceptions to the compensation requirement that the Court proceeds to recognize. This alone is enough to show that there is little utility in attempting to deal with this case on the merits.

The imprudence of proceeding to the merits in spite of these unpromising circumstances is underscored by the fact that, in doing so, the Court cannot help but assume something about the scope of the uncertain concept of total deprivation, even when it is barred from explicating total deprivation directly. Thus, when the Court concludes that the application of nuisance law provides an exception to the general rule that complete denial of economically beneficial use of property amounts to a compensable taking, the Court will be understood to suggest (if it does not assume) that there are in fact circumstances in which state-law nuisance abatement may amount to a denial of all beneficial land use as that concept is to be employed in our takings jurisprudence under the Fifth and Fourteenth Amendments. The nature of nuisance law, however, indicates that application of a regulation defensible on grounds of nuisance prevention or abatement will quite probably not amount to a complete deprivation in fact. The nuisance enquiry focuses on conduct, not on the character of the property on which that conduct is performed, see 4 Restatement (Second) of Torts § 821B (1979) (public nuisance); id., § 822 (private nuisance), and the remedies for such conduct usually leave the property owner with other reasonable uses of his property, see W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 90 (5th ed 1984) (public nuisances usually remedied by criminal prosecution or abatement), id., § 89 (private nuisances usually remedied by damages, injunction or abatement); see also, e.g., Mugler v Kansas, 123 US 623, 668-669, 31 L Ed 205, 8 S Ct 273 (1887) (prohibition on use of property to manufacture intoxicating beverages "does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use . . . for certain forbidden purposes, is prejudicial to the public interests"); Hadacheck v Sebastian, 239 US 394, 412, 60 L Ed 348, 36 S Ct 143 (1915) (prohibition on operation of brickyard did not prohibit extraction of clay from which bricks were produced). Indeed, it is difficult to imagine property that can be used only to

REDEVELOPMENT AGENCY OF SALT LAKE CITY, Plaintiff and Respondent,

v.

Earl D. TANNER and Mary Louise Tanner, his wife, David V. Trask, Grant S. Kesler, and Larry V. Lunt, Defendants, Cross-Plaintiffs and Appellants,

v.

STANDARD LIFE INSURANCE COMPANY, a corporation, Defendant and Cross-Defendant.

REDEVELOPMENT AGENCY OF SALT LAKE CITY, Plaintiff and Respondent,

v.

Earl D. TANNER and Mary Louise Tanner, his wife; David V. Trask; Grant S. Kesler; and Larry V. Lunt, Defendants and Appellants.

REDEVELOPMENT AGENCY OF SALT LAKE CITY, Plaintiff and Respondent,

v.

TRASK & BRITT, a professional corporation; Grant S. Kesler; Larry V. Lunt; and Capitol Life Insurance Co., a corporation, Defendants and Appellants.

Nos. 17692, 19348 and 19684.

Supreme Court of Utah.

June 19, 1987.

Rehearing Denied Aug. 17, 1987.

City redevelopment agency brought actions to acquire properties within blighted area. The Third District Court, Salt Lake County, David B. Dee and Peter F. Leary, JJ., found that agency did not misrepresent or mislead condemnees into waiving claims and abandoning litigation challenging agency's jurisdiction to condemn their properties, and awarded compensation. Cases were consolidated on appeal. The Supreme Court, Hall, C.J., held that: (1) agency was not required to present proof of conditions precedent to condemnation, where condemnee signed stipulations waiving claims and defenses to authority of agen to condemn their properties and withdre condemnation funds which had been depc ited in court; (2) juror's cursory inspecti of subject premises did not mandate reve sal of jury verdict, where numerous phot graphs of building were received into ev dence at trial; and (3) refusal to allo condemnees to call agency's consultant t testify as expert witness regarding valu of property was not prejudicial error, an where consultant's testimony would no have substantially affected outcome.

Affirmed.

1. Stipulations ⇐14(4)

City redevelopment agency was not required to present proof of conditions precedent to condemnation in condemnation compensation trial where condemnees signed stipulations waiving all claims and defenses to authority of agency to condemn their property, and withdrew condemnation funds agency had deposited with court. U.C.A.1953, 11-19-23.9. 78-34-9.

2. Estoppel ⇐92(4)

Once property owner chooses to withdraw money deposited by state in obtaining condemnation order, owner waives all objections and defenses to action and to taking of his property, except any claim to greater compensation. U.C.A.1953, 78-34-9.

3. Appeal and Error ⇐931(1)

Where there is dispute and disagreement in evidence, reviewing court will assume that trial judge believed those aspects and fairly drew inferences to be derived therefrom which gave his decision support.

4. Trial ⇐344

Affidavits filed by third persons are not competent to impeach jury verdict.

5. Eminent Domain ⇐262(5)

Juror's cursory view of premises which formed basis of eminent domain proceedings did not warrant reversal of jury verdict, where numerous photographs of both

inside and outside of building were received into evidence at trial, condemnees were still using building as of time compensation proceeding was brought, and jury's verdict was fully supported by evidence.

6. Eminent Domain ⇐262(5)

Refusal to allow condemnees to call consultant for city redevelopment agency to testify as expert witness regarding value of condemned property was harmless error, if any, where consultant did not have independent opinion as to value of property, at least two other appraisors who actually appraised property testified as to its value, and other appraisors were available.

7. Appeal and Error ⇐1056.1(1)

Exclusion of evidence is harmless unless excluded evidence would probably have had substantial influence in bringing about different verdict or finding.

Harold A. Hintze, Provo, and William D. Oswald, Salt Lake City, for Redevelopment Agency.

Robert S. Campbell and E. Barney Gesas, Salt Lake City, for defendants Tanner, Trask, Kesler, and Lunt.

Craig S. Cook, Salt Lake City, for Trask & Britt.

HALL, Chief Justice:

These cases, consolidated for purposes of appeal, emanate from action of the Redevelopment Agency of Salt Lake City (the RDA) to acquire appellants' properties. The Tanner group in case No. 19348 and the Trask group in case No. 19684 appeal separate trial court determinations that the RDA did not misrepresent or mislead appellants into waiving claims and abandoning litigation challenging the RDA's jurisdiction to condemn their properties. Case No. 17692 involves a condemnation compensation trial and raises claims of jury misconduct and trial court error in denying appellants' request to call the RDA's consultant to testify as an "expert witness." For reasons enumerated below, we affirm the trial court's determination in each of the three appeals.

I

In 1969, the Utah legislature enacted the "Utah Neighborhood Development Act." [1] Under the provisions of this act, municipal redevelopment agencies are created and empowered in part to undertake "redevelopment projects" within areas determined to be "blighted." [2] Acquisition and redevelopment of "blighted" property contributes to the health of the community and may be accomplished by various means, including eminent domain.[3]

Pursuant to this act, Salt Lake City's Board of Commissioners (the Commission) was designated to act as the City's RDA. In June 1977, the Commission enacted an ordinance specifying 18½ blocks of downtown Salt Lake City, Utah, as a "blighted" area. Appellants' real properties are situated on Block 53 (between Third and Fourth South and State Street and Second East) and are included within the project area. In early 1979, the RDA began the statutory process necessary for the acquisition of Block 53. A "redevelopment plan" for Block 53 was finally published and put into effect by the Commission in June 1979.

In July 1979, the Tanner group and the Trask group filed separate actions in Third District Court challenging the authority of the RDA to condemn their properties.

Shortly thereafter, the RDA commissioned a private architectural firm to develop a "master plan" report for Block 53. Apparently, the purpose of this report was to provide recommendations and guidelines to private developers choosing to bid on the acquisition and redevelopment of the block. In October 1979, the RDA met with appellants at the architect's office to review

1. Utah Neighborhood Development Act, 1st Spec. Sess., ch. 5, 1969 Utah Laws 1134 (codified as amended at Utah Code Ann. §§ 11-19-1 to -35 (1986)). While amendments were made to this act in 1983, they do not affect the resolution of these appeals.

2. *Id.*

3. Utah Code Ann. § 11-19-23.9(2) (1986).

drawings and a scale model of the "master plan." Representations made by the RDA at and subsequent to that meeting are at issue herein.

In November 1979, the RDA offered the Trask group $277,400 and the Tanner group $394,000 for their respective properties. Both groups declined, and further negotiation continued for approximately two months. In January 1980, the RDA commenced condemnation proceedings against appellants' properties. Thereafter, the parties entered into stipulations wherein the RDA agreed to deposit with the court 100 percent of a higher estimate of the market value of the properties for appellants' immediate withdrawal and use. In exchange, appellants stipulated to the RDA's immediate possession of the properties and agreed to dismiss their lawsuits and waive all claims and challenges (except the issue of just compensation) to the RDA's authority to condemn. Pursuant to these stipulations, both trial courts entered orders of immediate occupancy for the RDA, and appellants withdrew the monies the RDA deposited with the courts. The parties thereafter proceeded to trial on the issue of "just compensation."

In August 1980, a jury awarded the Tanner group $357,000 as just compensation for their property. This sum was less than the $417,640 appellants originally received and resulted in a $60,640 refund to the RDA. Subsequently, the Trask group stipulated that the $294,044 offered by the RDA was in fact just compensation for their property.

Thereafter, the Tanner group filed appeal No. 17692, claiming jury misconduct and error by the court in refusing appellants' request to call the RDA's consultant to testify as an expert witness. While that appeal was pending, both the Trask group and the Tanner group alleged that the RDA misrepresented and abandoned its original plans for the use of their properties. Accordingly, appellants filed several motions below, including motions to vacate the orders of immediate occupancy and to dismiss the condemnation proceedings. Therein, appellants sought to withdraw their stipulations to the RDA's occupancy and right to condemn their properties.

Upon motions to this Court, we stayed the parties' pending appeals and remanded the cases to the trial courts for evidentiary proceedings on the issues of misrepresentation and mistake. We also issued an order of mandamus in *Tanner v. District Judges of Third Judicial District Court.*[4] Thereafter, both trial courts conducted evidentiary hearings and subsequently denied appellants' requests for relief, thereby sustaining the condemnation awards and the binding effect of the stipulations. Appeals in cases No. 19348 and No. 19684 followed.[5]

II

Cases No. 19348 and No. 19684

Both the Tanner group and the Trask group argue on appeal that since the RDA failed to follow statutory prerequisites to condemning their properties, the trial courts had no jurisdiction over the subject matter of the lawsuits and dismissal of the condemnation actions was required. However, as discussed below, the dispositive issue presented by these appeals is whether appellants were induced by mistake or misrepresentation into signing stipulations waiving all claims and defenses to the RDA's authority. The conclusions of the trial courts in favor of the RDA are not clearly erroneous and preclude this Court from substituting its judgment for that of the trial courts.

[1] Each "Order of Immediate Occupancy" based upon the parties' stipulations provided in pertinent part:

> [T]he Court having carefully examined the pleadings and the written Stipulation pertaining thereto referred to above, and, having determined that plaintiff has

4. 649 P.2d 5 (Utah 1982).

5. Due to their similarity, we deal with the issues raised in cases No. 19348 and No. 19684 simultaneously.

the right of eminent domain [6] and that the purpose for which the property of defendants sought by plaintiff herein to be condemned is for a public purpose [7] and that the property is located within a redevelopment project area which is blighted, and that the project area is detrimental or inimical to the public health, safety or welfare, and that the immediate occupancy thereof is necessary and proper; and, the *parties having expressly reserved* for future adjudication *only the issue of the amount of just compensation to be paid Defendants, in accordance with the provisions of Section 78-34-9,* Utah Code Annotated, 1953, as amended:

NOW, THEREFORE, IT IS HEREBY ORDERED AND ADJUDGED:

1. Subject to and in accordance with the "Stipulation for Order of Immediate Occupancy," a copy of which is attached hereto and by reference made a part hereof, Plaintiff be and is hereby authorized to occupy the property belonging to Defendants above-named described in the Complaint on file herein ... [descriptions of particular property] which said properties are sought for uses by the public in connection with and as part of the C.B.D. Neighborhood Development Project authorized and approved by the Salt Lake City Commission on June 21, 1979.

2. Plaintiff is hereby permitted to take immediate possession of said properties and continue in possession of the same pending further hearing and trial on the issue of just compensation which is the only issue which may be raised in this action....

3. Plaintiff has tendered into court and deposits with the Clerk of the Court herewith for the benefit of Defendants the sum of [$294,044 for the Trask group and $417,640 for the Tanner group] being 100% of the amount of just compensation based upon two independent appraisals which Plaintiff has caused to be made of the premises, adjusted to the date of taking.

....

5. Defendants may withdraw the [total sums indicated above] deposited with the Clerk of the Court for the use and benefit of Defendants without prejudice to any claim they may wish to assert for additional just compensation in the trial of the matter....

(Emphasis added.) Pursuant to these orders, the RDA deposited with the courts 100 percent of the agreed sums. Appellants subsequently withdrew these monies pursuant to Utah Code Ann. § 78-34-9 (1977), which provides in pertinent part:

> Upon the application of the parties in interest, the court shall order that the money deposited in the court be paid forthwith for or on account of the just compensation to be awarded in the proceeding. A payment to a defendant as aforesaid shall be held to be an *abandonment by such defendant of all defenses* excepting his claim for greater compensation.[8]

(Emphasis added.) The explicit effect of the parties' stipulations and withdrawal of funds pursuant to section 78-34-9 was to relieve the RDA of presenting proof that the conditions precedent to condemnation under section 11-19-23.9 had been met. Indeed, the plain language of both stipulations reflects the acknowledgment of all parties that the RDA was *entitled* to immediate occupancy. Because the stipulations do not recite the existence of controversy as to either the RDA's authority to take the properties or the RDA's compliance with statutory prerequisites to condemning

6. Under the provisions of the Utah Neighborhood Development Act, the RDA may condemn property through the procedures of eminent domain. Utah Code Ann. § 11-19-23.9 (1986); *see also Redevelopment Agency v. Barrutia,* 526 P.2d 47, 48 (Utah 1974); *Redevelopment Agency v. Mitsui Inv., Inc.,* 522 P.2d 1370, 1371 n. 2 (Utah 1974).

7. Redeveloping areas to terminate urban blight is a public purpose. *See Tribe v. Salt Lake City Corp.,* 540 P.2d 499, 503-04 (Utah 1975); *see also Berman v. Parker,* 348 U.S. 26, 33-34, 75 S.Ct. 98, 102-103, 99 L.Ed. 27 (1954).

8. This Court has heretofore indicated the applicability of section 78-34-9 to redevelopment law. *See, e.g., Mitsui Inv., Inc.,* 522 P.2d at 1372 & n. 3.

the same, appellants did not preserve any such issues for future determination. Consequently, in the appropriate exercise of discretion, the trial courts accepted the stipulations and entered the appropriate orders of occupancy. For all intents and purposes, the taking was then complete.

The fact that the stipulations only preserved the issue of just compensation for trial is not surprising. Whenever issues pertaining to authority or jurisdiction to condemn exist at the time an order of immediate occupancy is sought, the best interests of all concerned, including the court, dictate that those issues be resolved prior to issuance of the order. Otherwise, the condemnor runs the risk of defeat and the resultant loss of funds expended in preparing the property for its new use. Similarly, the condemnee runs the risk of irreparable harm to the property if the condemnor is permitted to occupy and alter the property to accommodate the new use. The specific facts of the instant case illustrate this conclusion. The RDA's planned use for the properties apparently included development and construction of new buildings and plazas. In view of the magnitude of this project and the resultant significant change in the nature of the existing properties, it is incomprehensible that the parties would stipulate and agree to orders of immediate occupancy if legitimate issues of authority and compliance with statutory procedures remained to be resolved.[9]

[2] In *Utah State Road Commission v. Friberg*,[10] the parties entered into a stipulation that was incorporated into an order establishing the state's right to condemn and reserving for later determination the amount of compensation to be awarded and the date for assessing valuation.[11] Therein, this Court noted, "A defendant may be barred from litigating the merits of t. State's authority after an order of immec ate occupancy has been granted if h waives his right to litigate those issues (he withdraws the money deposited by th State in obtaining the order." [12] This la guage correctly states the established ar applicable rule that once a property owne chooses to withdraw the money deposite by the State in obtaining the order, h waives *all* objections and defenses to th action and to the taking of his property except any claim to greater compensation.[13]

Appellants would have us ignore thi rule by recognizing that the "term 'defens es' [in section 78–34–9] cannot include th failure of the lower court[s] to acquire sub ject matter jurisdiction but rather is limitec to personal defenses of the landowner." Ir other words, appellants contend that ever though they waived all claims and defenses regarding the RDA's compliance with statutory procedures and authority to condemn, they can now raise those same claims and defenses to show the trial courts' lack of jurisdiction in these cases. We disagree. Appellants apparently misunderstand both the language of and principles behind section 78–34–9 and the nature and result of their stipulations. The stipulations are proof of the state's power to expel appellants from their properties. By entering into the stipulations and withdrawing the monies, appellants acknowledged that the jurisdictional conditions precedent to the RDA's exercising the power to condemn were properly satisfied. Therefore, the lower courts' jurisdiction in that regard was not at issue.

To adopt appellants' arguments would be to sanction abuse in settlement proceedings by allowing parties (once they determine that additional money is available) to invali-

9. *Utah State Rd. Comm'n v. Friberg*, 687 P.2d 821, 840 (Utah 1984) (Hall, C.J., dissenting).

10. 687 P.2d 821 (Utah 1984) (plurality opinion).

11. *Id.* at 827.

12. *Id.* at 833 n. 10 (citing Utah Code Ann. § 78–34–9).

13. *See* 6 J. Sackman, *Nichols on Eminent Domain*, § 24.11[1][c], at 24–177 (3d ed. 1986) (based upon the Uniform Eminent Domain Code); 6 J. Sackman, *Nichols on Eminent Domain*, § 26.31 (3d ed. 1986); 6A J. Sackman, *Nichols on Eminent Domain*, § 28.321(2) (3d ed. 1985); 1A J. Sackman, *Nichols on Eminent Domain* § 4.6, at 4–37 (3d ed. 1985) (waiver and estoppel); *see also City of Durham v. Bates*, 273 N.C. 336, 160 S.E.2d 60 (1968); *State v. Jackson*, 388 S.W.2d 924 (Tex.1965).

date stipulations by simply claiming that issues they stipulated to can forever be raised.[14] Indeed, departing from the rule in section 78–34–9 invites controversy in every condemnation case and affords a means for parties to manipulate the measure of the compensation, which the statutory provision attempts to prevent.

Therefore, upon accepting the benefits under section 78–34–9, appellants in the instant cases, absent misrepresentation, are precluded from attacking the Utah Neighborhood Development Act, the jurisdiction of the courts to enter the order granting the RDA possession of the properties, and the failure of the RDA to strictly comply with statutory prerequisites to condemnation. Accordingly, we now turn to the issue of misrepresentation and the factual circumstances underlying the stipulations.

III

Appellants claim that the trial courts erred by denying their motions in these cases. Without marshalling all of the evidence in support of the trial courts' determinations,[15] appellants summarily contend that they were improperly induced to withdraw their challenges to the condemnation proceedings by the RDA's own representations that their properties would be used for a municipal office building and plaza complex. These representations in turn allegedly persuaded appellants that the properties were being condemned for a public use. Therefore, they contend that they were led to believe that since the City could condemn their properties if the RDA failed in its attempt, they had no valid defense to the RDA's condemnation action or possibility of success in their related lawsuits. Consequently, they stipulated to the RDA's authority to condemn. Appellants now claim that the RDA's representations were either false when made or have become false because the RDA has abandoned the existence of an uncontroverted public use. Accordingly, appellants argue that the stipulations should be dismissed and they should be allowed to challenge the authority of and procedures followed by the RDA.

Also, appellants claim that the trial courts erred by ignoring this Court's mandate in *Tanner* and by not finding clear and convincing evidence of unilateral mistake or material misrepresentation requiring rescission of the stipulations. In short, appellants would have us believe that the lower courts arbitrarily disregarded and failed to fairly examine evidence on remand that plainly showed material misrepresentation and justifiable mistake that culminated in the stipulations to waive jurisdictional defenses. We are not persuaded.

First, the orders and opinion of this Court on remand did not mandate a particular result. Rather, we instructed the trial courts to take additional evidence and give due consideration to that evidence before reaching a conclusion.[16] At the evidentiary hearings, both trial courts heard extensive evidence regarding appellants' contentions. Appellants were given ample opportunity to present their evidence and arguments regarding mistake and misrepresentation. That the trial courts below declined to adopt appellants' contentions does not prove that they failed to give due consideration to appellants' evidence. Upon our review of the records, we conclude that the trial courts did not fail to comply with our orders and previous decision.

[3] Second, appellants' claims are predicated on our acceptance of their version of the events which occurred and how the trial courts should have perceived the circumstances as they existed. However, the facts appellants advance in support of their arguments are carefully chosen to the exclusion of other evidence in the records supporting the lower courts' decisions. Due to the trial court's advantaged posi-

14. In their briefs, appellants express a willingness to return the monies they withdrew if they could be allowed to challenge the jurisdiction and authority of the RDA to condemn their properties. Such willingness is irrelevant here.

15. *Ashton v. Ashton*, 733 P.2d 147, 150 (Utah 1987) (citing *Scharf v. BMG Corp.*, 700 P.2d 1068, 1070 (Utah 1985)).

16. *See Tanner*, 649 P.2d at 5–6.

tion, the presumptions favor its judgment.[17] Where there is dispute and disagreement in the evidence, we assume that the trial judge believed those aspects and fairly drew the inferences to be derived therefrom which gave his decision support.[18] To this end, neither trial judge found credible the evidence appellants marshalled. Instead, the courts viewed the evidence as supporting the determination that there were no material misrepresentations or mistakes underlying the stipulations. These conclusions are not clearly erroneous. Accordingly, the decisions of the trial courts are affirmed.

We have also examined appellants' other objections to the trial courts' determinations and find them to be without merit.

IV

Case No. 17692

In this case, the Tanner group attacks the Third District Court's denial of their motion for a new trial based upon alleged jury misconduct and failure to allow the RDA's consultant to testify as an expert witness. In April 1981, appellants presented affidavits alleging that several jurors had viewed the subject property during the trial on just compensation. Appellants claim that these unauthorized views were prejudicial grounds for a new trial. In denying appellants' motion for a new trial on the grounds of juror misconduct, the court observed:

> [W]hatever cursory visit was made to the condemned property was at most harmless error, and did not prejudice this jury which took considerable amount of time in reviewing all of the photographs and testimony of experts before arriving at its verdict.

Upon review of the record, the trial judge's determination is not clearly erroneous.

[4] First, a majority of the affidavits offered by appellants should not have been considered. Specifically, appellants provided several affidavits of affiants who "polled" the individual jurors. These affidavits purported to restate what jurors told the affiants after being contacted sometime subsequent to the trial.[19] As early as 1913, courts held that affidavits filed by third persons were not competent to impeach jury verdicts. In *Maryland Casualty Co. v. Seattle Electric Co.*,[20] that court held that "affidavits of third persons as to unsworn statements of jurors tending to show either the fact of misconduct or its effects upon the verdict cannot be received for any purpose because they are of a purely hearsay character." [21] Because appellants' affidavits are primarily of this character, the trial judge could properly refuse to consider them.

Second, appellants offered the affidavit of Don K. Green ("Juror Green") and contended that his view was manifestly prejudicial because of the changed conditions of the condemned property and the surrounding premises. In the past, this Court has ruled that in eminent domain proceedings, the jury is precluded from basing its verdict on self-obtained evidence not presented at trial.[22] However, many courts have held that an unauthorized visit by a juror will be regarded as harmless where the visit did not disclose any evidence not already admitted at trial.[23] Jury misconduct, there-

17. *McBride v. McBride*, 581 P.2d 996, 997 (Utah 1978).

18. *See Gillmor v. Gillmor*, 657 P.2d 736, 739 (Utah 1982).

19. Apparently, most jurors refused to sign affidavits admitting any unauthorized view.

20. 75 Wash. 430, 134 P. 1097 (1913).

21. *Id.* at 437, 134 P. at 1099–1100. *See also State v. Marvin*, 124 Ariz. 555, 559, 606 P.2d 406, 410 (1980) (en banc); *Rowley v. Group Health Coop.*, 16 Wash.App. 373, 379, 556 P.2d 250, 254 (1976).

22. *State ex rel. Road Comm'n v. White*, 22 Utah 2d 102, 103, 449 P.2d 114 (1969).

23. *See, e.g., Nelson v. C & C Plywood Corp.*, 154 Mont. 414, 432–33, 465 P.2d 314, 324 (1970); *Winters v. Hassenbusch*, 89 S.W.2d 546, 552–53 (Mo.Ct.App.1936); *Reed v. L. Hammel Dry Goods Co.*, 215 Ala. 494, 497, 111 So. 237, 239–40 (1927).

fore, must be judged on the individual facts and circumstances of the case.[24]

In the instant case, review of Juror Green's affidavit indicates that he experienced no more than a cursory view of the subject premises. Indeed, "[he merely] went inside the building along the hall of the first floor and then went out of the building. He then looked down the alley and looked at the side of the building." In contrast, numerous photographs of both the inside and outside of the building were received into evidence at trial, after the court determined that they adequately depicted the property on the day of its taking.

Appellants, however, cite this Court's decision in *State ex rel. Road Commission v. White*[25] as determinative of this issue. In *White*, individuals had "razed the frame house and extensively had demolished the interiors of the other buildings."[26] Therefore, because of one juror's unauthorized view of the property, "the jury well may have been influenced adversely with respect to an objective valuation of the property as of the time of taking."[27] *White* is distinguishable because that property had been vandalized and burned after the owner had vacated and before the compensation hearing. In contrast, appellants herein were still using the building in question as of the time of this just compensation proceeding.[28] Apparently, then, it had not significantly deteriorated and was not suffering from nonuse. Moreover, appellant Kesler himself testified at trial that the pictures admitted into evidence accurately reflected the property at the time of its taking, as well as at the time of trial. So, contrary to the assertion of appellants, the condition of the property had not changed significantly from the date of its taking until the date of trial.

[5] Accordingly, the jury's verdict in this case was fully supported by the evidence, and the observations made by the offending juror did not add to the evidence properly received and considered by the jury. Therefore, any error was harmless, and this reason for a new trial must fail.

Finally, appellants contend that the trial court erred in not allowing them to call the RDA's consultant to testify as an expert witness regarding the value of the property. By means of a motion in limine, the RDA excluded consultant Raymond Fletcher from giving subpoenaed testimony on the basis of the attorney-client privilege and the work product doctrine. Apparently, Fletcher had not actually appraised appellants' property and did not have an independent opinion as to its value. Rather, he had been retained as a confidential adviser to review the independent appraisals and consult with the RDA in preparation for the condemnation suit.

[6, 7] Appellants argue that because Fletcher's opinion as to the value of the property was higher than that of the appraiser who actually testified for the RDA, the value of the property was "low-balled" and appellants had no way to effectively contradict that evidence. In short, appellants claim that Fletcher's testimony could have been used to show that the value of appellants' land was greater than the amount the RDA was offering. The court granted the RDA's motion in limine to exclude Fletcher's testimony, apparently on the grounds that he had not actually appraised the property and was not an expert witness in that sense, but rather had worked as a consultant and confidential advisor to the RDA and its attorney. We pass over the potential attorney-client and work product problems that the RDA contends might have arisen had Fletcher testified, because we are satisfied that even if exclusion of the evidence was erroneous, the judgment still could not be reversed. The exclusion of evidence is harmless unless the excluded evidence would probably have had a substantial influence in bring-

24. *See White*, 22 Utah 2d at 103, 449 P.2d at 115.

25. 22 Utah 2d 102, 449 P.2d 114.

26. 22 Utah 2d at 103, 449 P.2d at 114.

27. *Id.*

28. Respondent notes in its brief that after the order of immediate occupancy was entered, the subject property was leased back to defendants.

ing about a different verdict or finding.[29] Upon viewing the evidence in the light most favorable to the jury verdict,[30] there is no reasonable likelihood that a different result would have followed from permitting the jury to consider the testimony of Fletcher as to the appraised value of the property; at least two other appraisers who actually appraised the property testified as to its value.[31] Nor have appellants shown that other appraisers were unavailable. Indeed, the record indicates that at least one other individual who actually appraised the property was not called by appellants to testify.

Appellants have not shown, and we do not believe, that Fletcher's testimony would have substantially affected the outcome. Therefore, exclusion of his testimony was not prejudicial error.

V

Conclusion

In sum, the determinations of the trial courts are not clearly erroneous, and there is no basis for reversing the judgments. Accordingly, the orders are in all respects affirmed.

STEWART, Associate C.J., HOWE and DURHAM, JJ., and GEORGE E. BALLIF, District Judge, concur.

ZIMMERMAN, J., having disqualified himself, does not participate herein; Ballif, District Judge, sat.

29. *Hill v. Hartog*, 658 P.2d 1206, 1208 (Utah 1983); *Gillmor*, 657 P.2d at 743.

30. *Hill*, 658 P.2d at 1209.

Chad A. SPOR, Ray Spor, Paul C. Spor, Spor Brothers Motor Company, a Utah corporation, Spors, Inc., a Utah corporation, and Gold-Spor Mining Company, a Wyoming corporation, Plaintiffs and Respondents,

v.

CRESTED BUTTE SILVER MINING, INC., a Colorado corporation, Defendant, Third-Party Plaintiff, and Appellant,

v.

CANDELARIA METALS, INC., a Nevada corporation, Third-Party Defendant.

No. 19403.

Supreme Court of Utah.

June 25, 1987.

In action which sought declaration of rescission or termination of preincorporation contract, the Fourth District Court, Millard County, David Sam, J., granted summary judgment in favor of first contracting party and second party appealed. The Supreme Court, Stewart, Associate C.J., held that genuine issues of material fact regarding whether prepayment of loan between parties was intended to satisfy all obligations of both parties under agreement, thus constituting either rescission or accord and satisfaction of entire agreement, precluded grant of summary judgment.

Reversed and remanded.

1. Contracts ⇐252, 253

Mutual rescission is like contract to undo prior contract and must include at least offer and acceptance and evidence mutual meeting of minds to rescind; this may take form of simple offer and acceptance or demand followed by agreement or

31. The fact that appellants' own appraiser testified that the property was worth $850,000 refutes appellants' argument that without Fletcher's testimony, they had no way to contradict the estimate of the RDA's appraiser.

STATE of Utah, Plaintiff and Appellee,

v.

David Franklin YOUNG, Defendant and Appellant.

No. 890424.

Supreme Court of Utah.

March 17, 1993.

Defendant was convicted in the Third District Court, Salt Lake County, Timothy R. Hanson, J., of first-degree murder and theft and was sentenced to death, and he appealed. The Supreme Court, Hall, C.J., held that: (1) death statute is constitutional; (2) court acted within discretion in ordering defendant to be shackled during portions of penalty phase; (3) prosecutor was entitled to introduce additional aggravating circumstances at penalty phase that were not charged or proven in the guilt phase; (4) defendant's pro se answer to civil complaint filed by victim's sister was properly admitted; (5) court properly allowed prosecutor to present rebuttal argument at penalty phase; (6) court properly rejected proffered instruction that jury could consider sympathy at penalty phase; (7) court should have upheld defendant's challenge for cause to juror who stated that death penalty was always appropriate; (8) jury should have been permitted to consider possible verdict of guilty and mentally ill; and (9) defendant was entitled to present allocution by way of statement to jurors prior to deliberation at penalty phase.

Reversed and remanded.

Zimmerman, Durham and Stewart, JJ., concurred in part and dissented in part and filed opinions.

Hall, C.J. and Howe, Acting, C.J., dissented in part.

1. Homicide ⇐357(9)

Aggravating circumstance of death penalty statute that the homicide was committed for personal or pecuniary gain gave adequate notice to defendant that it applied to the killing of the victim and taking of her purse, money, credit cards, and truck. (Per Chief Justice Hall, with one Justice concurring and one Justice concurring in the result.) U.C.A.1953, 76–5–202(1)(f).

2. Homicide ⇐343

In view of fact that jury found first-degree murder with aggravating circumstances that the murder occurred during attempt to commit rape and for pecuniary gain, any error in applying to defendant aggravating circumstance that defendant had previous felony conviction was harmless with respect to determination that defendant was eligible for death penalty. (Per Chief Justice Hall, with one Justice concurring and one Justice concurring in the result.) U.C.A.1953, 76–5–202(1)(d, f, h).

3. Constitutional Law ⇐55

Doctrine of separation of powers prohibits state of Utah from requiring federal courts to review Utah conviction. (Per Chief Justice Hall, with one Justice concurring and one Justice concurring in the result.)

4. Criminal Law ⇐1206.1(2)

Death penalty under Utah statutory scheme is constitutional. (Per Chief Justice Hall, with one Justice concurring and one Justice concurring in the result.) U.C.A.1953, 76–5–202.

5. Jury ⇐33(1.1, 2.10)

Defendant has right to impartial jury drawn from fair cross section of community.

6. Jury ⇐33(1.1)

To establish prima facie violation of right to jury that represents fair cross section of community, defendant must show that excluded group represented distinctive group in community, that group was not fairly and reasonably represented in jury venires, and that underrepresentation is due to systematic exclusion of group during jury selection process.

7. Jury ⇐33(1.10)

Geographical distribution and socioeconomic status are not distinctive classifications or groups for Sixth Amendment fair

XIX. MERGING OF THEFT CONVICTION

[68] Defendant claims that his conviction for theft should merge with his murder conviction because theft is a lesser included offense of first degree murder under the aggravating circumstance that the murder was committed for personal or pecuniary gain. A defendant cannot be convicted of both first degree murder and a lesser included offense of that crime.[221] We have determined that one crime is a lesser included offense of another "where the two crimes are 'such that the greater cannot be committed without necessarily having committed the lesser.' " [222] This court examined the relationship between lesser included offenses and the aggravating circumstances under the first degree murder statute in the case of *State v. Shaffer*.[223] Although we held in *Shaffer* that the defendant's conviction of robbery merged with his conviction of murder under aggravating circumstance (h) in Utah Code Ann. § 76–5–202, we stated that a defendant could be convicted of a crime that might also serve as the basis for an aggravating circumstance if the prosecution did not rely on that crime for proof of the aggravating circumstance.[224]

[69] In determining whether the State relied on proof of the theft for its proof of the aggravating circumstance, it becomes necessary to examine what was actually proved at trial.[225] The jury convicted defendant of theft of a motor vehicle. The jury also convicted him under the aggravating circumstances in subsections (d) (rape), (h) (prior felony), and (f) (pecuniary or other personal gain). Evidence at trial was sufficient to prove aggravating factors (d) and (h) and also sufficient to prove that in addition to the victim's motor vehicle, defendant took her credit cards, her purse, and her money.[226] This additional evidence independently supports a finding of murder for gain under subsection (f). The crime of murder in the first degree under subsection (f) could have been proved absent the theft conviction. The trial court correctly determined that the theft conviction should not merge with the first degree murder conviction.

XX. CUMULATIVE ERROR

Defendant claims that the cumulative effect of errors during the guilt and penalty phases of his trial require a new penalty hearing. The doctrine of cumulative error allows for a new trial when standing alone, no error is severe enough to warrant a new trial, but when considered together, the errors denied the defendant a fair trial.[227] This court ascribes to the doctrine of cumulative error, but we do not believe that the doctrine warrants a new trial or penalty hearing in this case. Although defendant has claimed many errors on appeal, we have determined that the majority of his claims do not constitute error; the remainder are merely harmless error. We have examined the effect of the harmless errors and determine that the cumulation of these errors did not result in a fundamentally unfair trial.[228] Therefore, the doctrine of

221. Utah Code Ann. § 76–1–402(3).

222. *State v. Hill*, 674 P.2d 96, 97 (Utah 1983) (quoting *State v. Baker*, 671 P.2d 152, 156 (Utah 1983)).

223. 725 P.2d 1301 (Utah 1986).

224. *Id.* at 1314 n. 3.

225. *Hill*, 674 P.2d at 97.

226. The evidence, including defendant's own statements in his confession and in the pro se answer introduced in the penalty phase, also indicated that he killed the victim in order to prevent her from identifying him and to aid him in leaving the state. This evidence could be used to support a finding of "other personal gain" under subsection (f). While we have not defined "other personal gain," it seems clear that the purposes of escape and prevention of identification would fit within the plain meaning of those terms.

227. *State v. Ellis*, 748 P.2d 188, 191 (Utah 1987); *State v. Rammel*, 721 P.2d 498, 501–02 (Utah 1986).

228. *See generally State v. Bishop*, 753 P.2d 439, 499–500 (Utah 1988) (Zimmerman, J., concurring) (discussing harmlessness of several errors in light of confession and other evidence of guilt and gruesomeness of crime).

cumulative error does not afford defendant relief.[229]

We have duly reviewed defendant's other claims of error raised in the context of the points above and find them to be without merit.[230]

Associate Chief Justice Howe concurs in this opinion, and we would affirm the conviction and sentence. However, a majority of the court, in the opinions that follow, reverse and remand for a new trial.

HOWE, Associate C.J., concurs.

DURHAM, Justice:

I dissent from parts II, IV, X, XII, XV, and XVII.A of the lead opinion. I dissent in part from part VI of the lead opinion. I concur in the result reached in part VIII of the lead opinion but dissent from its rationale. The first three parts of this opinion address issues arising from the penalty phase of Young's trial. The next two parts address issues arising from the guilt phase of the trial. The ensuing two parts discuss jury selection issues. The final part analyzes the constitutionality of Utah's statutory scheme for narrowing the class of defendants eligible for the death penalty.

I. SHACKLING OF DEFENDANT DURING PENALTY PHASE

(lead opinion part XII)

Young argues that the trial court violated his rights under the Eighth and Fourteenth Amendments when it required him to remain in shackles in the presence of the jury during the penalty phase. I concur with the lead opinion that "it is within the sound discretion of the trial court to determine the safety measures *necessary* to insure the security of the courtroom and its occupants. These safety measures may include shackling a defendant *in appropriate circumstances.*" (Emphasis added.) The problem in this case is the manifest lack of the requisite necessity. Young's unwarranted shackling amounted to an impermissible comment on the evidence and violated his due process rights by creating unacceptable prejudice.

Because of the inherently prejudicial impact of appearing shackled before the jury, courtroom shackling is permitted only "as a last resort." *See Illinois v. Allen*, 397 U.S. 337, 344, 90 S.Ct. 1057, 1061, 25 L.Ed.2d 353 (1970). In all the cases I have examined, reviewing courts have required a showing of necessity before tolerating a trial court's decision to shackle. *See, e.g., Spain v. Rushen*, 883 F.2d 712, 728 (9th Cir.1989), *cert. denied*, 495 U.S. 910, 110 S.Ct. 1937, 109 L.Ed.2d 300 (1990); *Elledge v. Dugger*, 823 F.2d 1439, 1452 (11th Cir. 1987), *cert. denied*, 485 U.S. 1014, 108 S.Ct. 1487, 99 L.Ed.2d 715 (1988); *Tyars v. Finner*, 709 F.2d 1274, 1284–85 (9th Cir.1983); *People v. Duran*, 16 Cal.3d 282, 290, 127 Cal.Rptr. 618, 623, 545 P.2d 1322, 1327 (1976); *Bello v. State*, 547 So.2d 914, 918 (Fla.1989).[1] Thus, I agree with the Ninth Circuit that "a trial judge may ... impose restraints only when 'confronted with disruptive, contumacious, [and] stubbornly defiant defendants.' ... Shackling ... must be limited to cases urgently demanding that action." *Tyars*, 709 F.2d at 1284 (quoting *Allen*, 397 U.S. at 343, 90 S.Ct. at 1060–61).

Furthermore, before a court may shackle a disruptive defendant, it must first "pursue less restrictive alternatives." *Spain*, 883 F.2d at 721; *see also Tyars*, 709 F.2d at 1284. Lesser restraints could include increasing courtroom security personnel,

229. *See, e.g., State v. Gardner*, 789 P.2d 273, 288 (Utah 1989), *cert. denied*, 494 U.S. 1090, 110 S.Ct. 1837, 108 L.Ed.2d 965 (1990); *Bishop*, 753 P.2d at 489; *Rammel*, 721 P.2d at 498, 501–02.

230. *State v. Carter*, 776 P.2d 886, 896 (Utah 1989).

1. Even *Duckett v. State*, 104 Nev. 6, 752 P.2d 752, 755 (1988), upon which the lead opinion relies, admits that physical restraints at sentencing may not be imposed absent necessity. Furthermore, although *Duckett* upheld a sentencing-stage shackling order, it did not, as the lead opinion suggests, hold that the constitutional right to be free of shackles did not exist at sentencing; it held only that the constitutional right to be free of prison garb, established in *Estelle v. Williams*, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976), did not exist at sentencing.

27-12-160. I-15 designated as Veterans' Memorial Highway.

(1) There is established the Veterans' Memorial Highway composed of the existing Interstate Highway 15 from the Utah-Idaho border to the Utah-Arizona border.

(2) The department shall designate Interstate 15 as the "Veterans' Memorial Highway" on all future state highway maps. 1991

27-12-161. Legacy Loop Highway.

(1) There is established Legacy Loop Highway comprising the existing highway from Route 15 south of St George, northerly on Route 18 to Route 56 at Beryl Junction, then easterly on Route 56 to Interstate Highway 15 in Cedar City.

(2) The Department of Transportation shall designate the portions of the highways identified in Subsection (1) as the Legacy Loop Highway on all future state highway maps. 1991

CHAPTER 13

COLLECTOR ROAD CONSTRUCTION ACT

(Repealed by Laws 1975, ch. 76, § 47; 1982, ch. 30, § 5.)

27-13-1 to 27-13-10. Repealed.

CHAPTER 14

SIDEWALK CONSTRUCTION

Section

27-14-1. Citation.

This act shall be known and may be cited as the "Utah Sidewalk Construction Act" 1975 (1st S.S.)

27-14-2. Purpose.

The legislature recognizes that adequate sidewalks and pedestrian safety devices are essential to the general welfare of the citizens of the state It is the opinion of the legislature that existing sidewalks within the state, especially in the most populated areas, are not adequate to service the walking public with a result of creating unnecessary hazards to pedestrian and vehicular traffic. It is the intent of this act to provide a means whereby a portion of the funds received by the counties and participating cities as B and C road funds may be used for the construction of curbs, gutters, sidewalks and pedestrian safety devices pursuant to the guidelines set forth in this act The legislature deems it to be in the best interest of the state if pedestrian safety construction is to be performed on state highways that it be performed under the direction of the counties and participating cities pursuant to rules and regulations of the state Department of Transportation developed in cooperation with the counties and participating cities It is the further intention of the legislature that the funds permitted to be expended pursuant to this act be deemed additional to funds normally used by counties and participating cities for sidewalk construction and shall not be used in substitution for local sidewalk construction funds. 1975 (1st S.S.)

27-14-3. Definitions.

As used in this act

(1) "Construction" means the function of constructing or reconstructing a sidewalk with or without curb and gutter and shall include land acquisition, engineering or inspection and may be more fully defined by the rules and regulations of the Department of Transportation

(2) "Participating city" means any city having at least third class status

(3) "Curb and gutter" means the area between the roadway and sidewalk designed for water runoff and safety of pedestrian and vehicular traffic

(4) "Pedestrian safety devices" means any device or method designed to foster the safety of pedestrian traffic. 1975 (1st S.S.)

27-14-4. Designated county and city sidewalks — Construction on easements granted by transportation department.

(1) All sidewalks, including curbs and gutters within the unincorporated areas of a county and within nonparticipating cities or towns situated within the county, shall be designated county sidewalks. All sidewalks within participating cities shall be designated city sidewalks

(2) Notwithstanding any other provision of law counties and participating cities may construct and maintain curbs, gutters, sidewalks and pedestrian safety devices adjacent to the traveled portion of state highways upon easements that may be granted by the state Department of Transportation. The state Department of Transportation shall cooperate with counties and participating cities to accomplish pedestrian safety construction and maintenance. 1975 (1st S.S.)

27-14-5. Funding priorities by county and city officials — Factors.

(1) The county legislative body of the counties and the governing officials of participating cities may establish funding priorities relating to construction of curbs, gutters, sidewalks or other pedestrian safety construction, with funds permitted to be expended by this act, based on factors including, but not limited to.

(a) existing useable rights-of-way;

(b) auto-pedestrian accident experience;

(c) average daily automobile traffic;

(d) average daily pedestrian traffic;

(e) average daily school age pedestrian traffic; and

(f) speed of automobile traffic.

(2) All construction performed pursuant to this act shall be barrier free to wheelchairs at crosswalks and intersections. 1983

27-14-6. Pedestrian safety to be considered in highway planning.

Pedestrian safety considerations shall be included in all state highway engineering and planning where pedestrian traffic would be a significant factor on all

27-12-96. Acquisition of rights-of-way and other real property.

The department may acquire any real property or interests in real property necessary for temporary, present, or reasonable future state highway purposes by gift, agreement, exchange, purchase, condemnation, or otherwise. Highway purposes as used in this chapter includes:

(1) rights-of-way, including those necessary for state highways within cities and towns;

(2) the construction, reconstruction, relocation, improvement, and maintenance of the state highways and other highways, roads, and streets under the control of the department;

(3) limited access facilities, including rights of access, air, light, and view and frontage and service roads to highways;

(4) adequate drainage in connection with any highway, cut, fill, or channel change and the maintenance of any highway, cut, fill, or channel change;

(5) weighing stations, shops, offices, storage buildings and yards, and road maintenance or construction sites;

(6) road material sites, sites for the manufacture of road materials, and access roads to the sites;

(7) the maintenance of an unobstructed view of any portion of a highway to promote the safety of the traveling public;

(8) the placement of traffic signals, directional signs, and other signs, fences, curbs, barriers, and obstructions for the convenience of the traveling public;

(9) the construction and maintenance of storm sewers, sidewalks, and highway illumination;

(10) the construction and maintenance of livestock highways; and

(11) the construction and maintenance of roadside rest areas adjacent to or near any highway.

(2) the names of all owners and claimants of the property, if known, or a statement that they are unknown, who must be styled defendants

(3) a statement of the right of the plaintiff

(4) if a right of way is sought, the complaint must show its location, general route and termini, and must be accompanied by a map thereof, so far as the same is involved in the action or proceeding.

(5) a description of each piece of land sought to be taken, and whether the same includes the whole or only part of an entire parcel or tract All parcels lying in the county and required for the same public use may be included in the same or separate proceedings, at the option of the plaintiff, but the court may consolidate or separate them to suit the convenience of parties 1953

78-34-7. Who may appear and defend.

All persons in occupation of, or having or claiming an interest in, any of the property described in the complaint, or in the damages for the taking thereof, though not named, may appear, plead and defend, each in respect to his own property or interest, or that claimed by him, in the same manner as if named in the complaint. 1953

78-34-8. Powers of court or judge.

The court or judge thereof shall have power

(1) to hear and determine all adverse or conflicting claims to the property sought to be condemned, and to the damages therefor, and

(2) to determine the respective rights of different parties seeking condemnation of the same property. 1981

78-34-9. Occupancy of premises pending action — Deposit paid into court — Procedure for payment of compensation.

The plaintiff may move the court or a judge thereof, at any time after the commencement of suit, on notice to the defendant, if he is a resident of the state, or has appeared by attorney in the action, otherwise by serving a notice directed to him on the clerk of the court, for an order permitting the plaintiff to occupy the premises sought to be condemned pending the action, including appeal, and to do such work thereon as may be required The court or a judge thereof shall take proof by affidavit or otherwise of the value of the premises sought to be condemned and of the damages which will accrue from the condemnation, and of the reasons for requiring a speedy occupation, and shall grant or refuse the motion according to the equity of the case and the relative damages which may accrue to the parties. If the motion is granted, the court or judge shall enter its order requiring the plaintiff as a condition precedent to occupancy to file with the clerk of the court a sum equivalent to at least 75% of the condemning authority's appraised valuation of the property sought to be condemned. The amount thus fixed shall be for the purposes of the motion only, and shall not be admissible in evidence on final hearing The rights of the just compensation for the land so taken or damaged shall vest in the parties entitled thereto, and said compensation shall be ascertained and awarded as provided in Section 78-34-10 and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the rate of 8% per annum on the amount finally awarded as the value of the property and damages, from the date of taking actual possession thereof by the plaintiff or order of occupancy, whichever is earlier, to the date of judgment, but interest shall not be allowed on so much thereof as shall have been paid into court Upon the application of the parties in interest, the court shall order the money deposited in the court be paid forthwith for or on account of the just compensation to be awarded in the proceeding A payment to a defendant as aforesaid shall be held to be an abandonment by such defendant of all defenses excepting his claim for greater compensation If the compensation finally awarded in respect of such lands, or any parcel thereof, shall exceed the amount of the money so received the court shall enter judgment against the plaintiff for the amount of the deficiency If the amount of money so received by the defendant is greater than the amount finally awarded, the court shall enter judgment against the defendant for the amount of the excess Upon the filing of the petition for immediate occupancy the court shall fix the time within which, and the terms upon which, the parties in possession shall be required to surrender possession to the plaintiff The court shall make such orders in respect to encumbrances, liens, rents, assessments, insurance and other charges, if any, as shall be just and equitable. 1953

78-34-10. Compensation and damages — How assessed.

The court, jury or referee must hear such legal evidence as may be offered by any of the parties to the proceedings, and thereupon must ascertain and assess.

(1) the value of the property sought to be condemned and all improvements thereon appertaining to the realty, and of each and every separate estate or interest therein, and if it consists of different parcels, the value of each parcel and of each estate or interest therein shall be separately assessed

(2) if the property sought to be condemned constitutes only a part of a larger parcel, the damages which will accrue to the portion not sought to be condemned by reason of its severance from the portion sought to be condemned and the construction of the improvement in the manner proposed by the plaintiff.

(3) if the property, though no part thereof is taken, will be damaged by the construction of the proposed improvement, the amount of such damages.

(4) separately, how much the portion not sought to be condemned, and each estate or interest therein, will be benefited, if at all, by the construction of the improvement proposed by the plaintiff If the benefit shall be equal to the damages assessed under Subdivision (2) of this section, the owner of the parcel shall be allowed no compensation except the value of the portion taken, but if the benefit shall be less than the damages so assessed, the former shall be deducted from the latter, and the remainder shall be the only damages allowed in addition to the value of the portion taken.

(5) As far as practicable compensation must be assessed for each source of damages separately 1953

78-34-11. When right to damages deemed to have accrued.

For the purpose of assessing compensation and damages, the right thereto shall be deemed to have accrued at the date of the service of summons, and the actual value at that date shall be the measure of compensation for all property to be actually taken, and

78-34-11. When right to damages deemed to have accrued.

For the purpose of assessing compensation and damages, the right thereto shall be deemed to have accrued at the date of the service of summons, and its actual value at that date shall be the measure of compensation for all property to be actually taken, and the basis of damages to property not actually taken, but injuriously affected, in all cases where such damages are allowed, as provided in the next preceding section [Section 78-34-10]. No improvements put upon the property subsequent to the date of service of summons shall be included in the assessment of compensation or damages. 1953

CONSTITUTION OF UTAH

PREAMBLE

Grateful to Almighty God for life and liberty, we, the people of Utah, in order to secure and perpetuate the principles of free government, do ordain and establish this CONSTITUTION. 1896

ARTICLE I

DECLARATION OF RIGHTS

Section 1. [Inherent and inalienable rights.]
All men have the inherent and inalienable right to enjoy and defend their lives and liberties; to acquire, possess and protect property; to worship according to the dictates of their consciences; to assemble peaceably, protest against wrongs, and petition for redress of grievances; to communicate freely their thoughts and opinions, being responsible for the abuse of that right. 1896

Sec. 2. [All political power inherent in the people.]
All political power is inherent in the people; and all free governments are founded on their authority for their equal protection and benefit, and they have the right to alter or reform their government as the public welfare may require. 1896

Sec. 3. [Utah inseparable from the Union.]
The State of Utah is an inseparable part of the Federal Union and the Constitution of the United States is the supreme law of the land. 1896

Sec. 4. [Religious liberty — No property qualification to vote or hold office.]
The rights of conscience shall never be infringed. The State shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; no religious test shall be required as a qualification for any office of public trust or for any vote at any election; nor shall any person be incompetent as a witness or juror on account of religious belief or the absence thereof. There shall be no union of Church and State, nor shall any church dominate the State or interfere with its functions. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or for the support of any ecclesiastical establishment. No property qualification shall be required of any person to vote, or hold office, except as provided in this Constitution. 1896

Sec. 5. [Habeas corpus.]
The privilege of the writ of habeas corpus shall not be suspended, unless, in case of rebellion or invasion, the public safety requires it. 1896

Sec. 6. [Right to bear arms.]
The individual right of the people to keep and bear arms for security and defense of self, family, others, property, or the state, as well as for other lawful purposes shall not be infringed; but nothing herein shall prevent the legislature from defining the lawful use of arms. 1984 (2nd S.S.)

Sec. 7. [Due process of law.]
No person shall be deprived of life, liberty or property, without due process of law. 1896

Sec. 8. [Offenses bailable.]
(1) All persons charged with a crime shall be bailable except:

Sec. 19. [Treason defined — Proof.]
Treason against the State shall consist only in levying war against it, or in adhering to its enemies or in giving them aid and comfort No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act 1896

Sec. 20. [Military subordinate to the civil power.]
The military shall be in strict subordination to the civil power, and no soldier in time of peace, shall be quartered in any house without the consent of the owner, nor in time of war except in a manner to be prescribed by law 1896

Sec. 21. [Slavery forbidden.]
Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within this State 1896

Sec. 22. [Private property for public use.]
Private property shall not be taken or damaged for public use without just compensation 1896

Sec. 23. [Irrevocable franchises forbidden.]
No law shall be passed granting irrevocably any franchise, privilege or immunity 1896

Sec. 24. [Uniform operation of laws.]
All laws of a general nature shall have uniform operation 1896

Sec. 25. [Rights retained by people.]
This enumeration of rights shall not be construed to impair or deny others retained by the people 1896

Sec. 26. [Provisions mandatory and prohibitory.]
The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise 1896

Sec. 27. [Fundamental rights.]
Frequent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government 1896

Sec. 28. [Declaration of the rights of crime victims.] [Proposed.]
(1) To preserve and protect victims' rights to justice and due process, victims of crimes have these rights, as defined by law

(a) To be treated with fairness, respect, and dignity, and to be free from harassment and abuse throughout the criminal justice process,

(b) Upon request, to be informed of, be present at, and to be heard at important criminal justice hearings related to the victim, either in person or through a lawful representative, once a criminal information or indictment charging a crime has been publicly filed in court, and

(c) To have a sentencing judge, for the purpose of imposing an appropriate sentence, receive and consider, without evidentiary limitation, reliable information concerning the background, character, and conduct of a person convicted of an offense except that this subsection does not apply to capital cases or situations involving privileges

(2) Nothing in this section shall be construed as creating a cause of action for money damages, costs, or attorney's fees, or for dismissing any criminal charge, or relief from any criminal judgment

(3) The provisions of this section shall extend to all felony crimes and such other crimes or acts, including juvenile offenses, as the Legislature may provide

(4) The Legislature shall have the power to enforce and define this section by statute [1994]

ARTICLE II

STATE BOUNDARIES

Section
1 [State boundaries]

Section 1. [State boundaries.]
The boundaries of the State of Utah shall be as follows

Beginning at a point formed by the intersection of the thirty-second degree of longitude west from Washington, with the thirty-seventh degree of north latitude, thence due west along said thirty-seventh degree of north latitude to the intersection of the same with the thirty-seventh degree of longitude west from Washington, thence due north along said thirty-seventh degree of west longitude to the intersection of the same with the forty-second degree of north latitude, thence due east along said forty-second degree of north latitude to the intersection of the same with the thirty-fourth degree of longitude west from Washington, thence due south along said thirty-fourth degree of west longitude to the intersection of the same with the forty-first degree of north latitude, thence due east along said forty-first degree of north latitude to the intersection of the same with the thirty-second degree of longitude west from Washington, thence due south along said thirty-second degree of west longitude to the place of beginning 1896

ARTICLE III

ORDINANCE

[Religious toleration — Polygamy forbidden]
[Right to public domain disclaimed — Taxation of lands — Exemption]
[Territorial debts assumed]
[Free nonsectarian schools]

The following ordinance shall be irrevocable without the consent of the United States and the people of this State

[Religious toleration — Polygamy forbidden.]
First — Perfect toleration of religious sentiment is guaranteed No inhabitant of this State shall ever be molested in person or property on account of his or her mode of religious worship, but polygamous or plural marriages are forever prohibited 1896

[Right to public domain disclaimed — Taxation of lands — Exemption.]
Second — The people inhabiting this State do affirm and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries hereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes, and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States The lands belonging to citizens of the United States, residing without this State shall never be taxed at a higher rate than the lands belonging to residents of this State, but nothing

	CHARLES COTESWORTH PINCKNEY, CHARLES PINCKNEY, PIERCE BUTLER.
Georgia	WILLIAM FEW, ABR BALDWIN.

In Convention Monday September 17th 1787.

Present The States of

New Hampshire, Massachusetts, Connecticut, Mr. Hamilton from New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia. Resolved,

That the preceding Constitution be laid before the United States in Congress assembled, and that it is the Opinion of this Convention, that it should afterwards be submitted to a Convention of Delegates, chosen in each State by the People thereof, under the Recommendation of its Legislature, for their Assent and Ratification; and that each Convention assenting to, and ratifying the Same, should give Notice thereof to the United States in Congress assembled.

Resolved, That it is the Opinion of this Convention, that as soon as the Conventions of nine States shall have ratified this Constitution, the United States in Congress assembled should fix a Day on which Electors should be appointed by the States which shall have ratified the same, and a day on which the Electors should assemble to vote for the President, and the Time and Place for commencing Proceedings under this Constitution. That after such Publication the Electors, should be appointed, and the Senators and Representatives elected: That the Electors should meet on the Day fixed for the Election of the President, and should transmit their Votes certified, signed, sealed and directed, as the Constitution requires, to the Secretary of the United States in Congress assembled, that the Senators and Representatives should convene at the Time and Place assigned; that the Senators should appoint a President of the Senate, for the sole Purpose of receiving, opening and counting the Votes for President; and, that after he shall be chosen, the Congress, together with the President, should, without Delay, proceed to execute this Constitution.

By the Unanimous Order of the Convention.
GO. WASHINGTON, Presidt. W. JACKSON, Secretary.

AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

AMENDMENTS I-X [BILL OF RIGHTS]
AMENDMENTS XI-XXVII

AMENDMENT I

[Religious and political freedom.]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT II

[Right to bear arms.]

A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

AMENDMENT III

[Quartering soldiers.]

No Soldier shall, in time of peace, be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

AMENDMENT IV

[Unreasonable searches and seizures.]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V

[Criminal actions — Provisions concerning — Due process of law and just compensation clauses.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

[Rights of accused.]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of counsel for his defence.

AMENDMENT VII

[Trial by jury in civil cases.]

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

AMENDMENT VIII

[Bail — Punishment.]

Excessive bail shall not be required, nor excessive

UTAH DEPARTMENT OF TRANSPORTATION
2410 West 2100 South
Salt Lake City, Utah 84119

October 24, 1975

The Honorable Stanley Green, Mayor
City of Centerville
470 North 400 West
Centerville, Utah 84014

Dear Mayor Green:

This office has received two letters from Mr. L. Val Roberts, Attorney at Law, pertaining to the desire of residents to install curb and gutter on the west side of Main Street, north of Parrish Lane. It is our understanding that Centerville has an ordinance requiring installation of sidewalk where curb and gutter has been placed.

Inasmuch as the standard state right-of-way of 66 feet was in question, Mr. Bjorn Wang, District R/W Design Engineer, was asked to help resolve the problem. It appears the state does not have a 33 foot right-of-way west of the monument line through the area in question, but that placement of the curb and gutter with the back of curb 25.5 feet from the monument line (standard for 66' right-of-way) would be well within the state right-of-way.

Mr. Edward D. Julio, District Traffic Engineer, and I, made an on-the-site inspection to determine the possibility of shifting the curb and gutter easterly to provide room for the parking strip and sidewalk on existing right-of-way. It is our opinion that shift should not be made due to the width of the present roadway and the set-back of the existing curb and gutter north of the area.

We regret that we could not be more helpfull in providing a solution, however, the department does not have funds for obtaining additional right-of-way in that area at the present time. We do appreciate your concern for upgrading and providing a safe traffic condition on state highways.

Yours truly,

Andrew J. Sopko
Contract Claims & Utility Officer

cc: W. D. Hurley
L. Val Roberts
B. Wang
E. D. Julio

AJS:tb

FARMINGTON, UTAH, THURSDAY, DECEMBER 1, 1994

* * * * *

THE COURT: We are in chambers in the matter in Utah Department of Transportation vs. Joseph Val Ray Roberts and Verle Roberts, his wife. Case number 920700170. Mr. Ward is here on behalf of the Department of Transportation. Mr. Roberts is here representing himself and his wife. Mr. Roberts is a member of the bar. Counsel has asked to visit with the Court in chambers.

What can I help you with, gentlemen?

MR. WARD: Your Honor, I have a couple of concerns. Number one, after the taking of the depositions, it appears to me as though Mr. Jackman is $1,000 or less on his appraisal unless he's changed. We are 2,000 on our appraisal. I am not getting to the penny, and I am not representing that, I am just talking in generalities. I would like to know where we are going with this.

Mr. Roberts has -- when his deposition was taken, he's testified to 275,000.

THE COURT: Well, let me just say at this point, first of all, I think I will say right now, and this is where we are going, and I think I've equivocated about it on this. The only issue before the Court is the value of the property and any severance damage. Those are the only issues we will hear, period.

spent a good deal of time researching.

THE COURT: I have indicated before, the only issues before this Court at this time, Mr. Roberts, are value of the take before and after, and severance damage. It has nothing to do with the title to the property as far as where the line was located. That has been resolved by stipulation, and it's over and done.

MR. ROBERTS: As to the value of the severance damages, that figure that I gave of 103,000 versus 275,000 won't necessarily encompass the value associated with the loss of the use of the land on the south boundary of the driveway, because it's so narrow you can't do anything with it but grow weeds, and it would also include the loss of the land taken by the backfill and the berm along the west edge of the property, and it would also include the loss of the benefits from the nine-foot-high private hedge or eight-foot-high private hedge and the loss of the large willow tree.

THE COURT: So you've included in your change of value all of your severance damages?

MR. ROBERTS: That's what I've tried to do, your Honor, to the best of my ability. I am not otherwise competent to, except as a property owner, to testify as to what the individual value of any particular severance damage may be. I couldn't even tell you --

MR. WARD: Okay.

MR. ROBERTS: For that limited purpose, we don't object.

Q. (BY MR. WARD) So your original appraisal was based upon what, Mr. Holbrook?

A. The fact that the property necessary for construction of this project was already in the State right-of-way.

Q. How much was that appraisal?

A. $900.

Q. What was that based upon?

A. Well, it was based on a minimum value for the taking and the easement. Under the State acquisition schedules, there is a minimum value that is paid no matter how much property we take or whether we take any. If we need to get a deed and an instrument, there is a $250 minimum paid to the property owner, and for the temporary easement it would have been $100. And then I did give him some credit, even though it was in the right-of-way, for landscaping trees at the time, and it came to a total of $900 at that time.

MR. ROBERTS: Your Honor, I am going to object to his testimony that the improvements were in the right-of-way since your Honor has -- it's been offered only to explain that the testimony is a fact that it was that way and it is objectionable.

be considered as property taken.

So the fact that there is a berm behind that wall only is relevant insofar as it may constitute a diminution in the value of the remainder. In this case, there is no such testimony that the construction of the berm behind the wall, the wall, the elevation of the driveway or any of those items which may have altered somewhat the access to defendant's property in any way diminished the value of the remainder. There is absolutely no evidence to support that argument.

There has been evidence offered by Mr. Roberts of a value of the property at the time of the take to be $275,000. I assume he bases that on some commercial value, but the Court finds that the best evidence is that that was not the highest and best use. Even assuming it was, there is no basis to support that value in the property.

As to his testimony as to the value remaining after the take, the Court would find that the $103,000 estimate presented by Mr. Roberts is without support or foundation, and although as a property owner he has competency to testify relative to value, the question of the weight to be accorded to that testimony is for the Court, and the Court finds that based upon his experience, his basis for his estimates and general knowledge in that area, that his estimate in that regard is basically not competent.

The Court further notes that there has been

evidence relative to a grade behind the retaining wall not being provided in the plans, and possibly not in conformity with the guidelines of the building code and even department standards. The Court makes no finding as to why it ended up in that manner. However, there has been some evidence in that regard, but I have heard absolutely no evidence to the effect that it in any way affected the value of the remainder so as to constitute severance damage.

The Court will, however, order that the fill be placed to bring the grade up to as it's required by the plans. The Court will allow that either to be done by Mr. Roberts and reimburse him a reasonable amount or require that the city complete that.

Mr. Roberts, how do you want it? Do you want to do it or do you want them to do it?

MR. ROBERTS: If those are the choices, your Honor, they can do it. I would prefer a different choice.

THE COURT: That is the only alternative you have. The Court will order that the city is to bring the grade up to and equal to that provided by the plans. They are to slope the berm back over a three-foot area. They are to provide the fill sufficient to do that and sod sufficient to sod that from the west side of the retaining wall to a point three feet back from the wall. I calculate that that is 394 square feet of sod, and I estimate 28 cents a square

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF UTAH, IN AND FOR DAVIS COUNTY

UTAH DEPT. OF TRANSPORTATION Plaintiff -vs- JOSEPH VAN RAY ROBERTS Defendant	Case No. 920700170 TRANSCRIPT ON APPEAL

BE IT REMEMBERED that the above entitled matter came on for hearing before the Hon. RODNEY PAGE, Judge of the above entitled Court on November 17, 1992.

WHEREUPON the following proceedings were had and the following testimony was adduced, to wit:

A p p e a r a n c e s:

STEVE LEWIS, ESQ.
Attorney for Plaintiff;

J. VAL ROBERTS, ESQ.,
Attorney for Defendant.

THE COURT: What about number 12, Utah Department of Transportation vs. Val Roberts.

MR. ROBERTS: I believe that's stipulated, your Honor.

MR. LEWIS; We have a resolution, if we can approach.

THE COURT: You may. This is a question as far as the disposition of proceeds that are being held in the Clerk's office?

MR. LEWIS: Right. On the calendar it reflects Steve Ward is the moving party. My name is Steve Lewis.

THE COURT: I wouldn't want to be getting mixed up with his name either.

MR. WARD: I can take it.

MR. LEWIS: I don't work in the same division. I used to work in the same division. He is an honorable fellow.

THE COURT: Just in jest, Mr. Ward.

MR. LEWIS: The Motion, your Honor, is one by the Utah State Tax Commission for distribution of proceeds. Notice was given to Mr. and Mrs. Roberts and to counsel for UDOT. The Record should reflect that there was an affidavit filed reflecting amounts that were owed.

Originally in our motion we asked for--we asked that monies be distributed based on liens that had been filed in Davis County. Currently there is $900.00 being held by the

Clerk of the Court here. And Mr. Roberts today is stipulating that monies reflected in this affidavit, which total $782.46, would be distributed. He has initialed it.

MR. ROBERTS: If I may, your Honor--pardon me, about to lose my voice. If I may, what I am stipulating to is that their accounting is correct, and that the money is in fact owed. Because of the way at least I interpret the Utah statute on what happens if you remove proceeds in a condemnation action, I am not prepared to stipulate to the removal of the proceeds, except that--as far as myself is concerned, or my wife. What I am basically saying is that their accounting is correct and their liens are valid. I have no defense to them taking the amount of money that they have set out. And I have initialed the amounts as being correct.

So as far as agreeing to the distribution per se, that's not what I am doing.

MR. LEWIS: Your Honor, there is an affidavit that sets forth the amounts.

THE COURT: I have seen the affidavit.

MR. LEWIS: Okay. Out in the hall we went through that. I told Mr. Roberts if the distribution is made today, it will clear off all those balances.

MR. ROBERTS: And I don't dispute the accounting.

MR. LEWIS: That it would be in his interest.

THE COURT: Well, the Court will order that the

funds be distributed pursuant to the accounting set forth in the affidavit that was filed by Jan Penney. The balance of those funds I suppose you would like?

MR. ROBERTS: Oh, no, they stay here.

THE COURT: You want to remain there.

MR. ROBERTS: Yes, your Honor.

THE COURT: So you don't give up that question as far as that is concerned.

MR. ROBERTS: That's correct, your Honor.

THE COURT: With that understanding you may submit such an Order. The Court will sign that order.

Thank you all for appearing.

MR. LEWIS: If I can reflect on the record that a copy of that Order will be handed to Mr. Roberts and Mr. Ward today.

THE COURT: All right.

MR. LEWIS: One other small thing, on the affidavit it shows that the '91 return and the '91 return haven't been filed. Mr. Roberts reflects his '91 return has been filed with nothing owing. If there is something further owing, we may have a further motion before the Court.

THE COURT: Well, that's between you and Mr. Roberts.

MR. LEWIS: Thank you very much, your Honor.

MR. ROBERTS; May we take the Order and get

COPY

IN THE SECOND JUDICIAL DISTRICT COURT

IN AND FOR DAVIS COUNTY, STATE OF UTAH

UTAH DEPARTMENT OF TRANSPORTATION, Plaintiff, vs. JOSEPH VAL RAY ROBERTS and VERLE H. ROBERTS, Defendants.	Civil No. 920700170

BEFORE THE HONORABLE RODNEY S. PAGE

MAY 15, 1994

REPORTER'S TRANSCRIPT OF PROCEEDINGS

PRETRIAL CONFERENCE

Reported by: MICHELLE K. HARRISON,
CSR, RPR

THE COURT: One that requires it certain as to the sidewalk if federal funds are involved, and if you can show me the law, I'll take a look at that time and then we will look at whether federal funds are involved.

MR. ROBERTS: All right. That again is Title 29 of the federal code.

THE COURT: Submit it in the proper form and I will take a look at it. You have 10 days to do it.

MR. WARD: Your Honor, it's our position that the order of occupancy has been granted. He drew down on the money, the 7824.

THE COURT: Hasn't the money been drawn down?

MR. ROBERTS: No. That is another issue.

MR. WARD: The money has been drawn down, 7824.12 or something. The only issue left is how much. I mean if he had a question, he should have raised that at the time of the order of occupancy. We are not going to relitigate the design of the highway because that is not what the statute provides. When he draws down on the money, your Honor, and there is a Supreme Court case on this, Ogden vs. UDOT when he draws down on the money and doesn't reserve anything, the only issue left is how much do we owe him.

THE COURT: Mr. Roberts, that would be correct,

MR. ROBERTS: Except we didn't draw down on the money. In fact, both the letter and the statute which

requires the state to pay --

THE COURT: Did you withdraw the money?

MR. ROBERTS: No, your Honor.

MR. WARD: That is wrong, your Honor.

THE COURT: It's still in the file.

MR. ROBERTS: No. Let me tell you how it came together. We were in two hearings together. In fact, Ted Lewis, attorney for the State Tax Commission, knew about money being paid into this account three or four days before I did, and he called me and said they are going to pay another $500. What do you want to do with it? And I said, "I don't want anything done with it. It stays this way because of the very statute."

THE COURT: Did the State come in and take the money?

MR. ROBERTS: The State came in and took it. We don't have the 75 percent that is required.

THE COURT: Did you stipulate that they could?

MR. ROBERTS: No, sir. I said I don't have an offense to it. There is nothing I can do about it. I did not stipulate.

THE COURT: Did you appear?

MR. ROBERTS: I did appear at two hearings, your Honor, before yourself.

THE COURT: Did you consent to their withdrawal?

MR. ROBERTS: No, your Honor.

THE COURT: I see. We will need to look at what the minute entry says in those.

MR. ROBERTS: Absolutely no consent at all.

MR. WARD: We take the position, your Honor, some of what he says is true. We had a tax lien against him and they picked up the money, and if he had wanted to make reservations, he should have made them at that time reserving certain issues, and I'm unaware of that he did any of that.

THE COURT: We will look at that.

MR. ROBERTS: They were reserved too. If we need to, we will ask the court reporter to do a transcript.

THE COURT: Find those dates and I will have her look at those.

MR. ROBERTS: Now, that is another issue. As far as we are concerned, both our rights to parol process, equal protection of the law, and our sewer lines have been rich, because we have not received the money. It's just been passed from one State agency to the other. That's where we are at on that.

THE COURT: Okay.

MR. ROBERTS: Now, the other major problem is the 18 foot of the construction easement. No one has been willing to take the foot-and-a-half-high mound of earth that they left behind away and put the sod back the way it was.

in value?

A. No, sir.

Q. Are you aware, Mr. Jones, that the parties have entered into a stipulation to pay compensation?

MR. ROBERTS: Objection, relevance as to the survey.

THE COURT: Sustained. I think that has already been stipulated to, Counsel.

MR. WARD: I was asking if he knew that, your Honor.

THE COURT: It's irrelevant whether he knows that or not.

MR. WARD: All right.

No further questions, your Honor.

THE COURT: Redirect, Mr. Roberts?

REDIRECT EXAMINATION

BY MR. ROBERTS:

Q. Mr. Jones, at your deposition, I believe you testified that there were, in addition to I think what you referred to as the east boundary by description, there were two other lines establishing the east boundary of the defendant's property. Is that not so?

A. In my deposition, I believe I indicated that there were two possibilities of the west line of the right-of-way. If, in fact, you assume some things, one of

which was that if you assume that the old existing wells that were drilled many years ago along the west side of this street were contained with private property, then that west line would be approximately six feet east of where it's indicated on the Centerville plats now.

Q. Does that show on this survey?

A. Not on this one. It shows on the other survey, the other plat.

Q. This plat here?

A. Yes.

THE COURT: I think we are going now where I am not going to allow to us go, Mr. Roberts. We are not going to go litigate where your east boundary line is, period. That has been stipulated and decided, and I am not hearing any evidence in that regard other than what I've inadvertently let in at this point. So we are finished. That is not an issue. Go on if you want to go to something else, but we will hear no more about that.

MR. ROBERTS: It's the inadvertence that I believe prejudices the defendants' case in making a record on what the overall circumstances are surrounding the right-of-way from date of beginning to present taking.

THE COURT: Mr. Roberts, you entered into a stipulation and agreed where that boundary line was, and you are bound by that stipulation, and therefore, it's not a

question of litigation. Now, I won't tell you again. Let's go from there.

MR. ROBERTS: I appreciate the Court's utilization of inadvertence. No other questions for this witness.

MR. WARD: No further questions, your Honor.

MR. ROBERTS: Now, the issue then becomes --

THE COURT: Wait a minute. Are you through with this witness?

MR. ROBERTS: No further. He has no questions.

THE COURT: You may step down.

May this witness be excused?

MR. ROBERTS: This depends on what Mr. Campbell is going to testify to.

THE COURT: That is your problem. May this witness be excused?

MR. ROBERTS: Subject to re-call.

THE COURT: All right. You may be excused.

(Witness excused.)

MR. ROBERTS: May I speak with the witness privately, your Honor?

THE COURT: You may.

(Whereupon a discussion was held off the record.)

MR. ROBERTS: Yes, your Honor, this witness has other commitments. He will, however, be available on the

MR. ROBERTS: I have no other witnesses.

THE COURT: You rest subject to calling Mr. Aposhian?

MR. ROBERTS: And subject to, depending on what is testified to.

THE COURT: Well, you have a right to rebuttal.

MR. ROBERTS: Yes, rebuttal witnesses, that's fine.

THE COURT: You may proceed.

MR. WARD: We will call Mr. Dean Holbrook.

THE COURT: Mr. Holbrook, would you step up, please. If you would raise your right hand and face the clerk.

DEAN W. HOLBROOK

called as a witness by and on behalf of the Plaintiff, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WARD:

Q. State your name and your address and occupation if you would, Mr. Holbrook.

A. Dean W. Holbrook. 360 North 700 East, Bountiful, Utah. Right now, I'm retired. I was at the time of this acquisition the chief of right-of-way of the Utah Department of Transportation, and as such, I'm representing them here today.

appraisal of the subject property?

A. Yes. In fact, they are defined in the report itself.

Q. When were you first retained to make an appraisal of the subject property?

A. Well, I got involved with this acquisition back in 1990 and came out and took a look at it, and it went on for a period of time. The initial appraisal, per se, was done in 1992, and I made it at that time.

Q. Did you have occasion to talk with the landowner?

A. Oh, yes, many times.

Q. Did you explain to him what you were doing there?

A. Yes.

Q. Did you ultimately make an initial appraisal?

A. Yes.

Q. What was that based on?

A. My initial appraisal was -- just a moment here. My initial appraisal was based -- was made in April of 1992. It was made based on the fact that the property that was needed for this acquisition was already in the State right-of-way.

MR. WARD: Your Honor, I'm only offering this to explain the difference in the two appraisals. I am not trying to go into --

THE COURT: I understand.

MR. WARD: Okay.

MR. ROBERTS: For that limited purpose, we don't object.

Q. (BY MR. WARD) So your original appraisal was based upon what, Mr. Holbrook?

A. The fact that the property necessary for construction of this project was already in the State right-of-way.

Q. How much was that appraisal?

A. $900.

Q. What was that based upon?

A. Well, it was based on a minimum value for the taking and the easement. Under the State acquisition schedules, there is a minimum value that is paid no matter how much property we take or whether we take any. If we need to get a deed and an instrument, there is a $250 minimum paid to the property owner, and for the temporary easement it would have been $100. And then I did give him some credit, even though it was in the right-of-way, for landscaping trees at the time, and it came to a total of $900 at that time.

MR. ROBERTS: Your Honor, I am going to object to his testimony that the improvements were in the right-of-way since your Honor has -- it's been offered only to explain that the testimony is a fact that it was that way and it is objectionable.

THE COURT: I am not receiving it for the truth of the matter asserted in here as to the location of the right-of-way, only to explain the reasons for his valuation.

MR. WARD: I just didn't want it.

MR. ROBERTS: That is the term I should have used, truth of the matter asserted.

MR. WARD: There has been a change, your Honor.

THE COURT: I understand.

Q. (BY MR. WARD) Then the condemnation case was filed?

A. The condemnation case was filed.

Q. Then you were made aware of the stipulation of the parties?

A. That's right.

Q. That stipulation necessitated a revision of your appraisal?

A. Yes.

Q. In that the parties stipulated that six feet would be taken and paid for?

A. Yes.

Q. Did you make a new appraisal, Mr. Holbrook?

A. Yes, I did.

Q. Tell us about that appraisal.

A. Well, of course, the difference being that we were now going to pay for the property as defined in the